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**A Thousand Flowers Blooming,
or the Desert of the Real?
International Law and its many problems of history**

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*Others shape man: I narrate about him*²
Montaigne

It is not what has been done that shocks people, but what is said about it.
Epictetus³

Nehal Bhuta

A. Introduction

A young Antonio Gramsci fretted that ‘History teaches, but has no pupils.’⁴ Today, the international, the transnational, the global, the imperial, and the colonial—and their laws and histories—have so many academic pupils that we struggle to survey the contemporary landscape.⁵ Everyone, it seems, is following Frederic Jameson’s late Marxist injunction, ‘Always historicize!’⁶ Political theorists, international relations scholars, intellectual historians, global and international historians, legal historians (and self-described *critical* legal historians), literary studies scholars, as well as those unable to claim to be anything except ‘international lawyers’ by professional (de)formation, all seem to be

¹ Many scholars kindly provided comments and corrected mistakes. Those errors which remain are mine alone. With thanks to Luigi Nuzzo, Lauren Benton, Samuel Moyn, Martti Koskenniemi, Karen Knop, Thomas Duve, Megan Donaldson, Milos Vec, Matthew Craven, Jan Klabbers, Anne Peters, Randall Lesaffer, Ingo Venzke, Anthony Pagden, Quentin Skinner, Boyd van Dijk, Michelle Burgis-Kasthala, Deval Desai, Annabel Brett, and Rotem Giladi. Thanks to Geoff Gordon for an invaluable bibliographic tip. Matilde Masetti Placci provided indispensable research assistance, and also patiently corrected the text and the footnotes.

² Cited in Amos Funkenstein, *Theology and the Scientific Imagination: From the Middle Ages to the Seventeenth Century* (2nd edn., Princeton: Princeton University Press 2018) 212.

³ Cited in Reinhart Koselleck, *Sediments of Time: On Possible Histories* (Stanford: Stanford University Press 2018) 157.

⁴ Louise A. Tilly, ‘Gramsci and Factory Councils’, *International Labour and Working Class History*, 14/15 (1979) 33-41, at 33. As any teacher knows, of course, what pupils actually learn from the lessons taught, is another matter altogether.

⁵ For one valiant and helpful attempt, see Ignacio de la Rasilla, *International Law and History* (Cambridge: Cambridge University Press 2021).

⁶ Fredric Jameson, *The Political Unconscious* (London: Methuen 1981) 9.

inquiring into the historical pasts of what we now call the international and its many law-connected objects and subjects.

The ‘turn to history’ in international law, and the ‘turn to the international and global’ in the academic disciplines of history, could only implausibly be claimed to have singular origins—origin stories themselves are usually intended to sanctify or discredit.⁷ But the trends seem unmistakable: since the late 1990s, a variety of historical subdisciplines (intellectual history, cultural history, histories of political and social movements, and diplomatic history), have approached questions, objects, institutions, legal ideas—and occasionally laws and legal texts—that are ‘international’, ‘transnational’, ‘global’, or at the very least non-national. Armitage declares this ‘the most transformative historiographical movement since the rise of social history in the 1960s and the linguistic turn of the 1970s’, but notes that there is no

consensus on how these non-national approaches to history should be distinguished from each other. International historians often take for granted the existence of a society of states but look beyond state boundaries to map inter-state relationships ... Transnational historians examine processes, movements, and institutions that overflow territorial boundaries ... [such as] ... epidemics, corporations, religions, and international social movements ... And global historians treat the history and pre-histories of globalization, the histories of objects that have become universalized, and the links between sub-global arenas ... The family resemblance that links these approaches is the desire to go above or beyond the histories of states defined by nations and of nations bounded by states.⁸

The same period (circa 1999 onwards) also witnessed a rapidly accelerating interest within international law-related scholarship, in something called ‘the history of international law’, or even ‘the history and theory of international law’. The precise denotation of these terms is usually a matter

⁷ Judith N. Shklar, ‘Subversive Genealogies’, *Daedalus*, 101(1) (1972) 129-154; Raymond Geuss, ‘Genealogy as Critique’, *European Journal of Philosophy* 10(2) (2002) 209-215.

⁸ David Armitage, ‘The International Turn in Intellectual History’ in Darrin M. McMahon and Samuel Moyn (eds.), *Rethinking Modern European Intellectual History* (New York: Oxford University Press 2014) 233-245, at 233.

of stipulation: ‘when I say that this is a history of international law, I mean what international lawyers do when they do history, which is ...’ or ‘the history of international law is really a history of European discourses of natural law applied to the non-European world’. But stipulations such as these are unhelpful when we are trying to grasp the contours of an evolving body of discourses and writings that share, at best, *some* kind of family resemblance. Wherein do we see the resemblance? In titular subject matter (is international law in the title?), in method (is there a particular method of doing international legal history?), in objects of inquiry, or in some sense of the intrinsically ‘international’ (or non-national?) qualities of the inquiry?

It seems to me that no criterion can be decisive without falling back into the problems of stipulation. Rather, when we speak in the present (around here, about now) of a work or inquiry as within the family of discourses of ‘the history of international law’, we are saying that it fits within a broad network of subjects and objects, problematics, and preoccupations, that evince a concern with the historical past⁹ as it relates to something described as inter-national (or, global, transnational, universal, or planetary) and its laws (cultural and social discourses about order and morality, processes of jurisdictional conflict, positive legal texts, and perhaps soon software codes and algorithms). All of this, I would suggest, captures the kinds of *inquiries* we indicate when we use the term ‘the history of international law’ today.

For those seeking a sharply drawn concept, narrower stipulations are easily invented; these surely cannot be ruled out, for they depend on *what one believes such an inquiry into the historical past is for*. The purposes of such inquiries are—as both Nietzsche and Weber (and not only them) understood—questions of value for which many kinds of reasons can be advanced, but which are

⁹ I take this term from Michael Oakeshott, *On History and Other Essays* (Oxford: Blackwell 1983) 1-10.

not susceptible to conclusive demonstration.¹⁰ But the utility of sharply drawn definitions is not always as clear as the definitions themselves (and their advocates) might lead us to believe. As Wittgenstein muses in *Philosophical Investigations*,¹¹ ‘is it even always an advantage to replace an indistinct picture with a sharp one? Isn’t the indistinct one often exactly what we need?’ This paper proceeds in a Wittgensteinian spirit in its understanding of what might fall within the meaning of the term ‘the history of international law’. The principle reason for proceeding in this spirit is to allow us a more capacious vista on many ways in which inquiries into an historical past have developed over the last 30 years, in respect of the international and its law-connected objects and subjects. We are interested in grasping the diverse problems and preoccupations which have prompted these inquiries, and the family resemblances (the complicated network of similarities) which may characterize these problems and preoccupations—and the diverse modes and methods of inquiring into some part of the historical past that can be discerned from these inquiries.

The flourishing of historical and historiographical inquiries in relation to international law has been repeatedly noted since the first decade of the 21st century.¹² There is much ‘turn talk’¹³ in the notice taken of this trend, although it is not immediately clear whether we are all talking about the same turn, or an unruly concatenation of overlapping disciplinary turns (some, outward from national spaces to the extranational, and others, relocalizing or redomesticating the seemingly global

¹⁰ Guy Oakes, *Weber and Rickert: Concept Formation in the Cultural Sciences* (Cambridge: MIT Press 1988) chapters 1-5.

¹¹ Ludwig Wittgenstein, *Philosophical Investigations* (1951, text of 1953, eds. Joachim Schulte and Peter M. S. Hacker, transl. Gertrude E. M. Anscombe, 4th edn., Oxford: Blackwells 2009) paragraph 71.

¹² See Randall Lesaffer, ‘International Law and its History: A Story of an Unrequited Love’ in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *Time, History and International Law* (Leiden; Boston: Martinus Nijhoff Publishers 2007) 27-41; Matthew Craven, ‘International Law and its Histories’ in Craven, Fitzmaurice and Vogiatzi, *Time*, 1-25.; Thomas Skouteris, *The Turn to History in International Law* (Oxford: Oxford University Press 2017).

¹³ On the perils of turn talk in the discipline of history see Gary Wilder, ‘From Optic to Topic: The Foreclosure Effect of Historiographic Turns’, *American Historical Review* 117 (3) (2012) 723-745.

or universal, others still revisiting methodological presumptions and notions of source material).¹⁴ The academic discipline of history has undergone multiple *methodenstreit* associated with a variety of ‘turns’—social, linguistic, cultural, transnational, and global—since 1945. Dipesh Chakrabarty,¹⁵ an astute observer of the discipline, points out that the 20th century discipline of history has both a cloistered and a public life. The cloistered life ‘lives through journals, reviews, specialized conferences, university departments, professional associations and so on ... It is what gives a discipline its social and institutional authority, making people look on practitioners of the discipline as experts’. The cloistered life of history, its field-like¹⁶ quality as a distinct, differentiated space of knowledge production and of generation of claims of knowledge through (mutable) specialized methods, seeks to ‘instill a version of knowledge for which the protocols of knowledge are designed to ensure veracity in the judgment of the practitioners of the discipline’.¹⁷

But history—to a lesser extent even than law—has relatively few barriers to entry, except in some specialized fields: ‘generally speaking, history is probably the least technical of all social science disciplines’. As such, almost any person (academically trained or not, trained in history or not) can ‘presume to write and debate history’.¹⁸ Historical claims exchanged beyond the academy are closely tied to rhetorics, political and otherwise, such that ‘historical writings end up being embedded in different public contexts in very different ways’.¹⁹ One need only recall the ways in which the histories of 19th century (British) empire were mobilized against and *for* the invasion of Iraq in 2003²⁰

¹⁴ This is a point to which I will return further below.

¹⁵ Dipesh Chakrabarty, *The Calling of History: Sir Jadunath Sarkar and his Empire of Truth* (Chicago: Chicago University Press 2016) 8.

¹⁶ For the concept of a field see Pierre Bourdieu, *The Rules of Art: Genesis and Structure of the Literary Field* (1992, transl. Susan Emanuel, Stanford: Stanford University Press 1996) Parts I and II.

¹⁷ Chakrabarty, *The Calling of History*, 7

¹⁸ *Ibid.*

¹⁹ *Ibid.* 8.

²⁰ Geoff Eley, ‘Historicizing the Global, Politicizing Capital: Giving the Present a Name’, *History Workshop Journal*, 63(1) (2007) 154-188, at 154-155.

or the diverse stories we told ourselves about the origins of the Euro debt crises of 2010 to 2016.²¹ Historical narratives and claims populate our social imaginaries,²² embed concepts and schema of thought and action, and articulate a variety of possible understandings of how we came to be where we are, and why. Historical claim-making is common to myth, ideology, and critique. Chakrabarty suggests that these public lives of history also exert influence on the basic categories of its cloistered life, “research”, “facts”, “truth”, “evidence”, “archives”—can be molded by the interaction between history’s cloistered and public lives’.²³

There is nonetheless a deep and pervasive sense within students of international law, that our self-conscious preoccupation with our relationship to the past, has been both intensified and deepened in ways markedly different than several previous generations. As crude (and mostly English-centric) proxies for this flourishing of interest in the historical past of the international and its law-connected subjects and objects, we can observe the growth of the Oxford Series in the History and Theory of International Law²⁴—founded in 2013, it has, at the time of writing, 28 volumes in print or imminently forthcoming, with authors’ disciplinary affiliations ranging from law, to history, to political theory. Cambridge University Press’s Monographs in International and Comparative Law²⁵ has published 14 volumes since 2016 that are historical inquiries in some way or another. Brill’s series of Studies in the History of International Law has since 2011 published 23

²¹ See Adam Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (New York: Viking, an imprint of Penguin Random House LLC 2018).

²² See Samuel Moyn, ‘Imaginary Intellectual History’ in McMahon and Moyn, *European Intellectual History*, 113-126 for the origins of the idea of social imaginary and its relationship to histories of political and social thought.

²³ Chakrabarty, *The Calling of History*, 8-9.

²⁴ Nehal Bhuta, Anthony Pagden and Benjamin Straumann, General Editors.

²⁵ Larissa Van den Herik and Jean D’Aspremont, General Editors

volumes,²⁶ and the *Studien zur Geschichte des Völkerrechts*, founded by the late Michael Stolleis, has published 40 volumes since 2007.²⁷

These observations are but straws in the wind, not representative samples. In book series and journals devoted to political thought and international relations, and to international, regional, and global history, can be found inquiries into global (imperial, colonial, international) legal discourses and arguments, origins of international legal institutions, and social-political ideals, movement, and objectives (such as humanitarianism, development, interventionism, arbitration, self-determination) which are closely interlaced with spaces and agents constructed by international legal discourses. An exhaustive census is likely to be, well, exhausting, and quickly superseded.

B. Varieties of Presentism: Decisionism, Historicism and the Birth of *European Legal History*

Nietzsche complained (writing as he was at the apex and early decline of German historicism)²⁸ of the ‘consuming fever of history’²⁹ that surrounded him. Historical knowledge, he lamented, ‘streams in unceasingly from inexhaustible wells, the strange and incoherent forces its way forward, memory opens all its gates and yet is not open wide enough ... Modern man [sic] drags around with him a huge quantity of indigestible stones of knowledge, which then, as in the fairy tale, can sometimes be heard rumbling about inside him’.³⁰ Nietzsche worried that this ‘oversaturation’ of historical consciousness would paralyze us with cynicism, or equally dangerously, lead us to a fantasy of our

²⁶ Randall Lesaffer, General Editor.

²⁷ Anne Peters, Bardo Fassbender, Milos Vec, and Jochen von Bernstorff, General Editors

²⁸ Donald Bloxham, *Why History? A History* (Oxford: Oxford University Press 2020) 192-245; Thomas A. Howard, *Religion and the Rise of Historicism: WML de Wette, Jacob Burckhardt and the Theological Origins of Nineteenth Century Historical Consciousness* (Cambridge: Cambridge University Press 2000); Georg G. Iggers, *The German Conception of History: The National Tradition of Historical Thought from Herder to the Present* (Middletown: Wesleyan University Press 1968); Alan Megill, ‘Why Was There a Crisis of Historicism?’, *History and Theory*, 36(3) (1997) 416-429.

²⁹ Friedrich Nietzsche, ‘On the Uses and Disadvantages of History for Life’, in *Untimely Meditations* (1876, ed. Daniel Breazeale, transl. Reginald J. Hollingdale, Cambridge: Cambridge University Press 1997), 57-125, at 60.

³⁰ *Ibid* 78.

own progress—that we possess ‘the rarest virtue, justice, in a higher degree than any other time’.³¹

The problem of our relationship to history was in some sense the problem that, the more we know about the past, the more alien and remote—and thus less useful—it is to our actions in the present.

The *utility* of the past requires, for Nietzsche, a kind of decisionism in which we choose a vitalist mode of being in which history can be consigned to a proper role: as storehouse of tradition, or as exemplary monuments of greatness or folly, or as relentless, dissolutive, genealogical objectivity. The third of these is in some sense the most modern historical consciousness, but also the one that troubles Nietzsche the most, because ‘Objectivity and Justice have nothing to do with each other’.³²

The unsparing historical inquiry of this kind, ‘uproots the future because it destroys illusions and robs the things that exist of the atmosphere in which alone they can live. Historical justice, when it is genuine and practised with the purest of intentions, is therefore a dreadful virtue ... Its judgment is always annihilating’.³³ Nietzsche’s ultimate answer is to seek a mode of unhistoricality in the way we relate to the historical past, as we are ineluctably future-oriented beings who must live for tomorrow, not yesterday: ‘the antidote to the historical is called—*the unhistorical and the superhistorical*’.³⁴ The unhistorical is ‘the power of *forgetting* and of enclosing oneself within a bounded *horizon*’ while the superhistorical refers to the powers which ‘leads the eye away from becoming towards’ belief systems ‘which bestow upon existence the character of the eternal and stable’.³⁵ Exemplary belief systems of this kind, for Nietzsche, were art and religion, rather than history and science.

Nietzsche’s reflections dramatize the stakes of all this historical inquiry, and perhaps shed some light on why we might be so exercised about the inflation and diffusion of the interest in the

³¹ Ibid 83.

³² Ibid 91.

³³ Ibid 95.

³⁴ Ibid 95.

³⁵ Ibid 120.

pasts of international law-related objects and subjects. Historical inquiry is ‘eternally youthful’³⁶ and ‘forever being rewritten’³⁷ precisely because its modal relationship with our future-oriented present action-horizon *can be* very pronounced. *One possible* modality of our relationship to the past is what Oakeshott called the practical past³⁸—the past is looked back upon as a storehouse of ‘message-bearing survivals’ (objects, performances such as texts, images, and exemplars of human conduct etc) which may ‘may be said to afford us a current vocabulary of self-understanding and self-expression ... [this storehouse of the past may] have been made to yield important conclusions about ourselves and our current circumstances; [for example] that it is a past which displays a “progressive” movement to which our own times belong; that it exhibits a darkness to which our own enlightenment is a gratifying contrast; that it tells a story of decline and retrogression of which we are the unfortunate heirs’.³⁹ Oakeshott argues that this modality of relating to the past—these practical pasts—are concerned principally with constructing a ‘symbolic vocabulary of practical discourse’,⁴⁰ a product of ‘practical imagination’ that relates to the past insofar as that past has a currency in relation to the time and circumstances in which this vocabulary of practical discourse is deployed.

Koskenniemi expresses some preference for this modality of our relation to the past as a practical past, when he contends that ‘historians of international law must accept that the *validity* of our histories lies not in their correspondence with ‘facts’ or ‘coherence’ with what we otherwise know about a ‘context,’ but how they contribute to emancipation today’.⁴¹ These practical pasts are

³⁶ Max Weber, ‘The ‘objectivity’ of knowledge in social science and social policy’ in *Max Weber: Collected Methodological Writings* (eds. Hans H. Bruun and Sam Whimster, trans. Hans H. Bruun, London: Routledge 2014) 100-138, at 133.

³⁷ Koselleck, *Sediments of Time*, 113.

³⁸ Oakeshott, *Three Essays*, 23. Oakeshott’s debt to Heidegger is considerable, and he has this in common with Koselleck and Chakrabarty.

³⁹ Oakeshott, *Three Essays*, 23.

⁴⁰ Oakeshott, *Three Essays*, 43.

⁴¹ Martti Koskenniemi, ‘Vitoria and Us’, *Rechtsgeschichte* Rg, 22 (2014) 119-138, at 129, my emphasis.

indispensable to our future-oriented action; the seeming urgency of articulating and constituting them in our now-time is engendered by an ineluctable sense that our present is always already a space of possible futures inherited from the past: ‘A human being simply cannot avoid being oriented toward the future. Yet the fact of having been there already—what Heidegger calls “I am as having been”—is also beyond the control of the human. All our pasts are therefore futural in orientation. They help us make the unavoidable journey into the future’.⁴² Koskenniemi’s injunction that the *validity* of the results of our historical inquires lies in the contribution to emancipation *now* instantiates what Chakrabarty calls *decisionism* as a relationship to the past. Decisionism presents itself as a critical alternative to a *certain kind of historicism* (of which more later) in as much as the critic purports to relate to the future and the past

as though there were concrete, value laden choices or decisions to be made with regard to both. The critic is guided by his or her values to choose the most desirable, sane, and wise future for humanity, and looks to the past as a warehouse of resources on which to draw as needed. This relationship to the past incorporates the revolutionary-modernist position in which the reformer seeks to bring (a particular) history to nullity in order to build up society from scratch.

The uses of the past are guided by a critique of the present, but Chakrabarty points out that both decisionism and historicism are invested in a modernist dream of a *true present*: a present disclosed either as the outcome of a ‘not yet’ or unrealized actual unfolding from the past, or a present from which we can self-consciously reconstitute our relationship to the past (*‘the validity of our histories depends ...’*) in a way that discloses the path towards a desired future. Decisionism of this kind naturally carries some risks (as historicism does, of a different kind). Oakeshott points out that one predictable consequence of an intensively practical relationship to our past, of the decisionist variety, is that such a past is

⁴² Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press 2000) 248.

valued in respect of the support it may give to what is recognized to be a desirable present of practical engagements, and when it is found to be valuable we say that 'history is on our side.' But it may contain items which are not only worthless but recognized to be positively injurious and therefore proper to be forgotten or even proscribed. The removal, for example, of the name of Trotsky from the official Bolshevik emblematic past or that of the explorer Stanley from the practical past of Zaïre was part of an undertaking to construct a symbolic vocabulary of practical discourse which would not prejudice an approved practical present.⁴³

Both decisionism *and* historicism are *varieties* of presentism, and in this sense we must agree with Koselleck that 'Every history is *Zeitgeschichte* and every history was, is and will be a history of the present'.⁴⁴ At some level, 'presentism' requires no defence, although many seem preoccupied with defending it.⁴⁵ But what does 'presentism' mean here? It need not be an epithet so much as a recognition of a condition for the starting point of an inquiry into a historical past: 'No science can escape from the conditions imposed by the constitution of the thinking mind which gives it birth ... [W]e always, either voluntarily or involuntarily, relate the course of past events to the complex effects which lies before us in the present [...and...] we are constantly drawing either special or general conclusions from the past and making use of them in our task of shaping the present with a view to the future'.⁴⁶ For Weber, as for Troeltsch, where no relation to the present can be found, we are in the realm of antiquarianism or 'work for work's sake'. Our sense of what matters in our present is a reflex of our own horizon of meaning and action *now*—our 'encounter with life in its immediate aspect', endowed as it is by 'an absolute infinite multiplicity of events "within" and "outside" ourselves, [events that] emerge and fade away successively and concurrently'.⁴⁷ What seems significant in our past (itself, an infinite sequence of events leading into our present moment)

⁴³ Oakeshott, *Three Essays*, 43.

⁴⁴ Koselleck, *Sediments of Time*, 103.

⁴⁵ See David Armitage, 'In Defense of Presentism' in Darrin M McMahon (ed.), *History of the Humanities and Human Flourishing* (Oxford: Oxford University Press 2020).

⁴⁶ Ernst Troeltsch, *Protestantism and Progress: The Significance of Protestantism for the Rise of the Modern World* (1904, text of 1912, transl. William Montgomery, Philadelphia: Fortress Press 1986) 17.

⁴⁷ Weber, 'Objectivity', 114.

is an ascription of value, a judgment which selects what finite part of the infinite stream of antecedent events is 'important' or 'worth knowing about'.⁴⁸ This ascription of value is itself subject to the

immeasurable stream of events [flowing] unending towards eternity. The cultural problems that move humankind constantly assume new forms and colourings; within that ever-infinite stream of individual events, the boundaries of the area that acquires meaning and significance for us ... therefore remain fluid. The intellectual framework within which it is considered and scientifically comprehended shifts over time; thus, *the points of departure of the cultural sciences* [such as history] remain subject to change in the limitless future...⁴⁹

Weber's argument that only a 'hair-thin line'⁵⁰ separated the sciences of culture from subjective belief reflected not only his debt to Nietzsche.⁵¹ It was also part of a wider milieu, the critique and crisis of historicism,⁵² in the sense of that preponderantly German⁵³ style of historical thought that accompanied the rise and institutionalization of an academic discipline of history in 19th century Europe.⁵⁴ The *problemstellung* of historicism was *both* the problem of meaning *in* history (Historicism 1) and the problem of the meaning *of* history (Historicism 2).⁵⁵ Answers to these problems did not always coincide, but sometimes did, especially in 19th century theories of historical

⁴⁸ Ibid 114.

⁴⁹ Ibid 121.

⁵⁰ Ibid 121.

⁵¹ See Peter Ghosh, *Max Weber and the Protestant Ethic: Twin Histories* (Oxford: Oxford University Press 2014) 388-389.

⁵² Oakes, *Weber and Rickert*, 36-37.

⁵³ See Friedrich Meinecke, *Historism: The Rise of a New Historical Outlook* (1936, text of 1958, transl. John E. Anderson, New York: Herder and Herder 1972) Part II.; Donald R. Kelley, *Faces of History: Historical Inquiry From Herodotus to Herder* (New Haven: Yale University Press 1998), chapter 9; Iggers, *The German Conception of History*.

⁵⁴ History was a particularly German academic endeavor in the 19th century. See Bloxham, *Why History?*, 192-245; Ghosh, *Max Weber and the Protestant Ethic*, 104-105: In 1810, Germany had 5 chairs of history; in 1870, 56 chairs, and in 1910.

⁵⁵ Kelley, *Faces of History*, 265-269. Funkenstein, *Theology*, 206-210. Samuel Moyn puts the relation between these 2 versions of historicism deftly: 'Where the one definition fastens on the particularity of every historical moment and separates it from all the rest, the alternative definition binds each historical moment to every other so that they combine to add up to a complete master-script of time.' Samuel Moyn, 'Amos Funkenstein on the Theological Origins of Historicism' *Journal of the History of Ideas* (64(4)) (2004) 639-657, at 642.

development. Funkenstein, a sure-footed guide in this treacherous terrain, notes that ‘the many versions of reason in history from Vico to Marx are only speculative byproducts of a profound revolution in historical thought in the sixteenth and seventeenth centuries, namely the discovery of history as *contextual reasoning*’.⁵⁶ Uniting Renaissance legal humanism’s attempt to discern the meaning of Roman laws in their original late-antique contexts,⁵⁷ and early modern political thought’s abiding preoccupation with the ‘barbarian origins’ of civil morality in stadial histories of the development of political society and civil peace,⁵⁸ what I have called Historicism 2 and Historicism 1 combined “‘invisible hand” interpretations *of* history and the new, contextual reasoning *in* history”⁵⁹—a macronarrative philosophical history denoting ‘*both* the condition at which history was arriving *and* the state of mind in which it should be written and understood’.⁶⁰ Common to both Historicism 1 and Historicism 2, was the sense of ‘immanent structures that have to be unearthed. Historical sources reveal their information indirectly ... The “spirit of the people”, the “genius of the times”

⁵⁶ Funkenstein, *Theology*, 206.

⁵⁷ Ibid 209: “Ever since the sixteenth century, philologists, jurists, and biblical critics had developed methods of understanding through alienation and reconstruction: they severed past monuments, institutions, events from their actual connotation and association, and interpreted them in light of their remote original setting as if they were details of a strange new continent.” Kelley, *Faces of History*, chapter 8; John G.A. Pocock, *Barbarism and Religion: Narratives of Civil Government* (Cambridge: Cambridge University Press 1999, Vol 2) 16: ‘It was through philology thus operating that ‘history’ acquired the meaning it never had before, and has not lost since: that of an archaeology of past states of society, reconstructed by reconstituting the language in which their texts were written.’

⁵⁸ John G.A. Pocock, *Barbarism and Religion: The Enlightenment of Edward Gibbon, 1737-1764* (Cambridge: Cambridge University Press 1999, Vol 1) 1-13; Pocock, *Barbarism and Religion: Narratives*, 20-21: ‘What in succeeding chapters we shall call ‘the Enlightened narrative’ recounted the descent from classical antiquity into the darkness of ‘barbarism and religion,’ and the emergence from the latter set of conditions of a ‘Europe’ in which civil society could defend itself against disruption by either.’

⁵⁹ Funkenstein, *Theology*, 209.

⁶⁰ Pocock, *Barbarism and Religion: Volume 2*, 21. See also Friedrich Meinecke, *Historism: The Rise of a New Historical Outlook* (1936, text of 1958, transl. John E. Anderson, New York: Herder and Herder 1972) lviii: ‘[Historism] was a stage in the development of Western thought. For there is an intimate connection between evolutionary and individualizing thought-forms. It belongs to the essence of individuality ... that it is revealed only by a process of development. ... The idea of development superseded the method of dealing with historical changes prevailing hitherto ... [which] treated history as a useful collection of examples for pedagogical purposes, and explained historical changes in terms of superficial causes, either of a personal or a material kind.’

does not announce itself in the sources; it has to be reconstructed from them'.⁶¹ The longer theological—principally, Judaic and Christian—lineages of Historicism 2 (*qua* eschatology and redemption) were traced by Funkenstein, in a complex renovation and extension of Löwith's argument.⁶² Historicism 1 and Historicism 2 are *both* presentist: Historicism 1 reconstructs the meaning of texts and events in their past context, but 'the reconstruction is always linked to [the historian's] "point of view" in the present'.⁶³ Historicism 2 takes a path discerned in history's *determinations of the now*, as the path towards 'a future fulfilment'⁶⁴—a cryptic promissory note immanent in the now, deciphered by historians who can locate our present within this singular temporality.⁶⁵

When Chakrabarty writes that 'historicism enabled European domination of the world in the nineteenth century', it is Historicism 2 that he denotes. Historicism 2, then,

was one important form that the ideology of progress or 'development' took from the nineteenth century on. Historicism is what made modernity or capitalism look not simply global but rather as something that became global over time, by originating in one place (Europe) and then spreading outside it. ...

It was one important form that the ideology of progress or 'development' took from the nineteenth century on. ... This 'first in Europe, then elsewhere' structure of global historical time was historicist... Historicism thus posited historical time as a measure of the cultural distance (at least in institutional development) that was assumed to exist between the West and the non-West. In the colonies, it legitimated the idea of civilization. In Europe itself, it made possible completely internalist histories of Europe in which Europe was described as the site of the first occurrence of capitalism, modernity, or Enlightenment.⁶⁶

⁶¹ Funkenstein, *Theology*, 209.

⁶² Samuel Moyn, 'Amos Funkenstein'; Karl Löwith, *Meaning in History: The Theological Implications of the Philosophy of History* (Chicago: University of Chicago Press 1949).

⁶³ Funkenstein, quoted in Moyn, 'Amos Funkenstein', 652.

⁶⁴ Löwith, *Meaning in History*, 197. For a different, but commensurable, interpretation of two historicisms, see: Howard, *Religion and the Rise of Historicism*, 12-14.

⁶⁵ Chakrabarty, *Provincializing Europe*, 15.

⁶⁶ *Ibid* 7-8.

This historicism, and ‘perhaps even the modern European *idea* of history’, became Europe’s way of saying ‘not yet’ to non-European peoples.⁶⁷ But it was also intractably related to what Koselleck famously called the *Neuzeit* of modernity, a horizon of *expectation* in which time is homogenous and ‘constantly outpacing itself’ on its way to a better future—whether reformist, liberal, or revolutionary-utopian.⁶⁸ The phrase ‘progress of history’ is first employed after 1800,⁶⁹ reflecting an epochal reckoning with the accelerated change unleashed by the French Revolution and its yet-to-be-realized utopian possibilities.⁷⁰ Koselleck notes that ‘all intellectuals born [in the footsteps of Herder and Kant], idealists or romantics, designed philosophies of history in order to redeem the achievements of the French Revolution as an initial pledge toward a rational future ... All of these philosophical-historical interpretations went out of their way to conceive of the present day as a necessarily transitional phase on the way to a better future ... History was an agent of higher necessity that could redeem these different hopes and desires’.⁷¹ Historicism and modernity were born twins.

Napoleon’s invasions and his ensuing Codes inescapably posed the question of the relationship between the progress of history and law—and so provoked in many ways the 19th century discipline of (European) national legal history itself.⁷² In what sense could binding legal authority be a pure legislative act of (changeable) popular-sovereign will, and not a concrete

⁶⁷ Ibid 8.

⁶⁸ Koselleck, *Sediments of Time*, 90.

⁶⁹ Ibid.

⁷⁰ Ibid 96-7. Löwith similarly observes that ‘the French Revolution, with its destruction of tradition, had a historicizing effect upon the consciousness of contemporaries. Thenceforth, the time of the present ... views itself expressly as belonging to the course of history, looking toward the future.’ Karl Löwith, *From Hegel to Nietzsche: The Revolution in Nineteenth Century Thought* (text of 1941, New York: Holt, Rinehart & Wilson 1964) 202.

⁷¹ Koselleck, *Sediments of Time*, 63-64. See also Thomas J. McPartland, ‘Historicism’ in Michael T. Gibbons (ed.), *The Encyclopedia of Political Thought* (Hoboken: John Wiley & Sons 2015) 1-3.

⁷² See James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton: Princeton University Press 1990).

expression of the already-constituted customs, history, and life of a nation and its peoples? One historicist answer to this question was that the will of the people was itself reason-in-history, and it was history that had been the medium for the actualization of reason through Revolution and Bonapartist rule: Hegel's famous figure of Napoleon as *the soul of the world on horseback*.⁷³ Another historicist answer, given by von Savigny, was that the true foundation of authoritative law lay in the customs which expressed the historical spirit and substance of a concrete people.⁷⁴

C. What *Was* the History of International Law?

While histories of legal acts, court histories of sovereign agreements and correspondence,⁷⁵ and treatises collecting legal usages and documents, were produced with regularity—usually by European jurists and diplomats—through the 18th century,⁷⁶ and began (in the form of Universal Histories) to show some evidence of the impact of rising tide of stadial histories of European civilization that sought to elucidate the conditions for the overcoming of ‘barbarism and religion’ *within* Europe, there is a crucial sense in which the history of international law—and many of the characteristics we attribute to it—is a product of 19th century historical jurisprudence and its historicisms.

It is widely observed by (European) legal historians, that theirs is a discipline born of the 19th century,⁷⁷ distinguishable from other versions of ‘what history was’ in the preceding 200 hundred

⁷³ ‘I saw the Emperor – that soul of world-wide significance – riding on a parade through the city. It is indeed a wonderful sensation to see such an individual, who here, concentrated at one point, sitting upon a horse, encompasses the world and rules it.’ Hegel’s letter cited in Löwith, *From Hegel to Nietzsche*, 215.

⁷⁴ Gerhard Dilcher, ‘The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism and Rationalization’, *Rechtsgeschichte* Rg, 24 (2016) 20-72, at 26-30.

⁷⁵ See Pärtel Piirimäe, ‘Official Historiography and the State in Early Modern Europe’, *History of Historiography* 71(1) (2017) 47-76.

⁷⁶ See the examples given by Dhondt and Lesaffer in this volume [reference to be added when volume finalized].

⁷⁷ See Thomas Duve, ‘German Legal History: National Traditions and Transnational Perspectives’, *Rechtsgeschichte* Rg 22 (2014) 16-48; Joshua Getzler, ‘Law, History and the Social Sciences: Intellectual Traditions of Late Nineteenth- and Early Twentieth-Century Europe’, in Andrew Lewis and Michael Lobban (eds.), *Law and History: Current Legal Issues* (Law and History, Oxford: Oxford University Press 2004, Vol. 6) 214-263; John Cairns, ‘Intellectual History and Legal History’ in Richard Whatmore and Brian Young (eds.) *A*

years.⁷⁸ Cairns points out that the first specialist periodical devoted to legal history was the *Zeitschrift für geschichtliche Rechtswissenschaft* (1815-1848), produced by von Savigny, Eichhorn, and Göschen,⁷⁹ and that ‘it is possible to trace the impact of the German Historical School’ through much of Europe, and that after World War Two, ‘Koschaker and Wieacker both identified the development of legal history into a discipline with the rise of the Historical School of Law in Germany’.⁸⁰ Duve also echoes this judgment in a long retrospect on the discipline of legal history in Germany: ‘[I]n the late 19th and throughout much of the 20th century, the German concept of Legal History served as a model in many places across the globe ...’⁸¹ National legal history in Europe inhaled deeply of the historicist atmosphere of 19th century German historical thought, producing in particular a rich vein of speculation concerned with establishing the relationship between, on the one side, law and the *particular historical manifestation* of a people and its culture, and on the other, between this organic connection of people and law and a more *universal concept* of culture and civilization.⁸² This *historical jurisprudence*—indebted to Savigny but also over time absorbing the *philosophical* historicism of

Companion to Intellectual History (Malden: Wiley Blackwell 2016) 213-229. Peter G. Stein, *Legal Evolution: The Story of an Idea* (Cambridge: Cambridge University Press 1980).

⁷⁸ See Anthony Grafton, *What Was History? The Art of History in Early Modern Europe* (Cambridge: Cambridge University Press 2007) for an account of 16th and 17th century.

⁷⁹ Cairns ‘Intellectual History’, 213. See also Kelley, *Faces of History*, 268.

⁸⁰ Cairns, ‘Intellectual History’, 216.

⁸¹ Duve, ‘German Legal History’, 31-32. In ‘Global Legal History’, Duve observes that *European legal history* as a distinct and autonomous field (premised “on a cultural unity demarcated sharply from others and largely contiguous with a geographic territory in the centre of which Europe is located”) is a product of the post 1945 period, but even here an indebtedness to the program of the German Historical School and its academic practices, was strong. Thomas Duve, ‘Global Legal History: Setting Europe in Perspective’ in Heikki Pihlajamäki, Markus D. Dubber and Mark Godfrey (eds.), *The Oxford Handbook of European Legal History* (Oxford: Oxford University Press 2018) 116-140, at 125, 128. My thanks to Thomas Duve for helping me sharpen the distinction between 19th century legal history as practised in Western European national legal historiography – and shaped foundationally by the German historical school – and European legal history.

⁸² Dilcher, ‘The Germanists and the Historical School of Law’, 29. Thomas Duve, ‘What is Global Legal History?’ *Comparative Legal History* 8(2) (2020) 73-115, at 78: “national legal history was seen as a particular – and, usually, privileged – historical formation, shaped by the distinct national spirits, but expressing universal principles.” See Ernst-Wolfgang Böckenförde’s devastating critique of the paradoxes generated by these assumptions: ‘Historical jurisprudence and the problem of the historicity of law’ in *State, Society and Liberty: Studies in Political Theory and Constitutional Law* (1982, transl. Jim A. Underwood Oxford: Berg Publishers 1991), chapter 1.

Hegel⁸³—understood law was not only a *product* of history and its progress, but also a *medium* for such progression and evolution; in a century in which Europe’s domination and exploitation of the globe achieved its apotheosis,⁸⁴ it was surely no accident that ‘the superiority of Western law and organization and the telos of progress’ were the ‘leitmotifs’ of 19th century historical jurisprudence: ‘explaining the special development and dominance of the West (including the special nature of Western law) had been a preoccupation ... and there was a tendency to describe certain products or features of European social organization (such as the rule of law, property rights, limited governments and so on) as the key factors in human history’.⁸⁵ Developmental and evolutionary models of progress *in* history had a special affinity with accounts of legal development towards a

⁸³ On the severe *philosophical* incompatibilities of Savigny and Hegel (and the conflict between Hegel’s discipline Gans, and Savigny) see: Christoph Kletzer, ‘Custom and Positivity: an examination of the philosophic ground of the Hegel-Savigny controversy’ in Amanda Perreau-Saussine and James B. Murphy (eds.), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge: Cambridge University Press 2009) 125-148. Nonetheless, these philosophical differences were largely washed out of subsequent developments in historical jurisprudence, especially in international legal thought. *Volksgeist* à la Savigny became assimilable to the progress of the World Spirit à la Hegel, through the mediation of civilization and its promotion. See Luigi Nuzzo, *Lawyers, Space and Subjects: Historical Perspectives on the Western Legal Tradition* (Naples: Pensa 2020).

⁸⁴ As Osterhammel puts it, ‘No other century was even nearly as much Europe’s century ... Never before had the western peninsula of Eurasia ruled and exploited larger areas of the globe. Never had changes originating in Europe achieved such impact on the rest of the world ... The nineteenth century was a European one also in the sense that other continents took Europe as their yardstick. Europe’s hold over them was threefold: it had power, which it often deployed with ruthlessness and violence; it had influence, which it knew how to spread through countless channels of capitalist expansion; and it had the force of example, against which even many of its victims did not balk. ... The history of the nineteenth century was made in and by Europe, to an extent that cannot be said of either the eighteenth or twentieth century, not to speak of earlier periods.’ Jürgen Osterhammel, *The Transformation of the World: A Global History of the Nineteenth Century* (transl. Patrick Camiller, Princeton: Princeton University Press 2014) xx.

It is important to register, however, that European legal history’s self-valorizing narration of Europe’s world historical mission, was by no means frictionlessly received and assimilated by those subjected to its force: See Liliana Obregon, ‘Peripheral Histories of International Law’, *Annual Review of Law and Social Sciences*, 15(1) (2019) 437-451.

⁸⁵ Getzler, ‘Law, History and the Social Sciences’, 226.

more perfect realization of the reason inherent in law's concepts. The impact of 'the great systems of German idealism'⁸⁶ here is evident:

The new and common element of this [German] idealist position lies in consistent and systematic temporalization. Justice, whatever it might be, is realized in and through the entirety of world history. In their relation to world history, humans are always given over to structures of 'already' and 'not yet' and these structures force them to realize justice ... This also makes it possible to conceive of history in its diachronicity as a path towards the rule of law, toward a league of nations, and to act accordingly.

It is no longer the individual history that displays a justice inherent in it; instead, as an open-ended totality, world history is subject to the rational necessity of progressively transforming the human expression of power into legally secured and, even more important, just conditions.⁸⁷

European historical jurisprudence—and the national legal historiographies it inspired—was a philosophical history, which later took a sociological turn.⁸⁸ It began swimming against a certain stream of Enlightenment universal history (of the philosophes and the statist *Aufklärer*),⁸⁹ but ultimately made its home within the oceanic currents and slip-streams of 19th century historicism in both of the senses outlined above: it inquired intensively into the contextual meaning and authority of law *in* historical contexts, and also did not refrain from arranging these contexts into a sweeping universal temporality of human progress *in history*.

'The history of international law', then, is a short-hand expression for that branch of European historical jurisprudence that expressly concerned itself with what we might today call the

⁸⁶ Koselleck, *Sediments of Time*, 108. See also Yirmiahu Yovel, *Kant and the Philosophy of History* (Princeton: Princeton University Press 1980), chapter 1 and B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge: Cambridge University Press 2010) chapters 7-9.

⁸⁷ Koselleck, *Sediments of Time*, 125-126.

⁸⁸ See Stein, *Legal Evolution*, 86-98 on Maine. Note should be taken of Montesquieu's *The Spirit of Laws* (1748, text of 1750, transl. Thomas Nugent, New York: Hafner Press 1949) as an early statement of the world historical significance of European law. On Maine, see Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton: Princeton University Press 2009).

⁸⁹ On this opposition, see Kelley, *Faces of History*, 268 and Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1370-1870* (Cambridge: Cambridge University Press 2021), chapter 12.

‘globalization’ of European law and *jus publicum Europaeum*, as an emanation, bearer, and agent of historical progress. It was a multi-faceted enterprise, as contributions to this volume show, taking on distinct complexions and preoccupations in different European national contexts.⁹⁰ Multi-volumed surveys of European legal acts and practices, such as Heeren’s *History of the European System of States and its Colonies* (1809), Ward’s *Enquiry into the Foundation and History of the Law of Nations in Europe* (1795), and Martens’ *Recueil des traités* (1791) and *Précis du droit des gens modernes de l’Europe* (1789, 1821) reflect the continuing influence of 18th century universal histories and their concern to identify a *Europäisches Völkerrecht* through a survey of the entire European legal landscape—taking the latter as empirical evidence of the actualization of universal natural law tenets that subtended the European state and its necessity.⁹¹ But the proto-historicism of 18th century German natural law (which Meinecke aptly summarized as treating ‘history as a useful collection of examples for pedagogical purposes’)⁹² gave way to more ambitious histories that reflected the formative power of historicist thought on the imagined world-historical role of European laws and customs as the path towards a universal legal civilization.⁹³ The close compatibility with theories and practices of racial hierarchy, as well as taxonomies of civilization and barbarism, requires no elaboration and can be easily observed in the late 19th century’s international law histories.⁹⁴ The latter period appears to have been one in which the nature of the *European historical jurisprudence* of international law as the overripe fruit of

⁹⁰ Chapters in this volume by Dhondt, Lesaffer and Armitage and del Rasilla (reference to be finalized once volume is finalized)

⁹¹ By far the best treatment of this to date is Koskenniemi, *To the Uttermost Parts of the Earth*, chapters 11 and 12.

⁹² Meinecke, *Historism*, lviii.

⁹³ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law* (Cambridge: Cambridge University Press 2002).

⁹⁴ E.g., Luigi Nuzzo, ‘History, Science and Christianity. International Law and Savigny’s Paradigm’ in Luigi Nuzzo and Miloš Vec (eds.), *Constructing International Law: The Birth of a Discipline* (Frankfurt: Vittorio Klostermann 2012) 25-50 and Matthew Craven, ‘The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law’ in Nuzzo and Vec, *Constructing International Law*, 363-402.

what I have termed ‘Historicism 2’ is much in evidence, and countless examples can be gathered of its logics of exclusion and inclusion revolving around European archetypes of social, political, and legal organization.⁹⁵

The late 19th century formation of a distinctive disciplinary field—and associated professional *habitus*—of international law has increasingly become a commonplace in how we understand the ‘birth of the discipline’.⁹⁶ One of the insights of the last two decades of renewed historical inquiry into the disciplinary field of international has been a recovery of the extent to which it leaned heavily on an understanding of its own *historical character* within an historicist philosophical history.⁹⁷ Craven incisively summarizes this close connection between the discipline’s formation, and its ‘consciousness of its own historical character’:⁹⁸

Whereas before, the non-European world could be perceived as an undifferentiated terrain—as the incidental locus of legal thought and action—it became the spatial exemplar of the new temporal ordering of international law. The process by which international law came to be understood as historically located was one that resulted in a divided realm of doctrine and practice in which those parts of the world that partook of that history were divided from those that had yet to participate in it. The redescription of the *ius inter gentes* as the public law of Europe appeared, thus, to be the merest logical expression of this anthropologically-informed historical consciousness.⁹⁹

⁹⁵ Jörg Fisch, “Zivilisation, Kultur” Otto Brunner, Werner Conze and Reinhart Koselleck (eds.), *Geschichtliche Grundbegriffe* (Stuttgart: Ernst Klett 1972, 8 vols.) 679-774; Gerrit W. Gong, *The Standard of Civilization in International Society* (Oxford: Clarendon Press 1984); Brett Bowden, *The Empire of Civilization: The Evolution of an Imperial Idea* (Chicago: Chicago University Press 2009); Ntina Tzouvala, *Capitalism as Civilization: A History of International Law* (Cambridge: Cambridge University Press 2020); Jennifer Pitts, *The Boundaries of the International: Law and Empire* (Cambridge: Harvard University Press 2018); Wil Smiley, *From Slaves to Prisoners of War: The Ottoman Empire, Russia and International Law* (Oxford: Oxford University Press 2018); Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press 2005); Koskenniemi, *The Gentle Civilizer*.

⁹⁶ Nuzzo and Vec, *Constructing International Law*, 2012; Koskenniemi, *The Gentle Civilizer*.

⁹⁷ Matthew Craven has consistently emphasized this: see Matthew Craven, ‘Theorizing the Turn to History in International Law’ in Anne Orford and Florian Hoffman (eds.), *The Handbook of the Theory of International Law* (Oxford: Oxford University Press 2016) 22-37.

⁹⁸ Craven, ‘The Invention of a Tradition’.

⁹⁹ *Ibid* 367.

The waiting room of history had found its global legal carapace, and surveys of histories of international law demonstrate the broad continuity—with some political and methodological variations—of these European modes of historical thinking and writing from the mid 19th century through to the early 20th.¹⁰⁰ The field of international law *and its historicisms* emerged from within an interconnected pan-European legal elite at the end of the 19th century. The projects pursued by these elites were diverse, from national unification to the recasting of republican and liberal political ideals, but they converged around the law and practice of late 19th century colonialism *and* the common problematic of peace and order *in* Europe (two different, but closely linked, projects of civilization).¹⁰¹

The historicism (in the sense of Historicism 2) of European historical jurisprudence shared, to an extent, in the wider epistemological and intellectual crisis that afflicted the atmosphere of historicist thought in the late 19th century. The consequence of a rigorous approach to the social and historical production of value and meaning *in* history was to raise squarely the problem of the relativity of values and meaning *across* historical periods, and to challenge any naïve assumptions about the relationship between conceptual and ideational schemes constructed by the sciences of culture and civilization, and the concrete reality of historical change.¹⁰² Weber, among others,¹⁰³

¹⁰⁰ Most helpful here is the survey by Koskenniemi: Martti Koskenniemi, 'A History of International Law Histories' in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of The History of International Law* (Oxford: Oxford University Press 2012) 943-971. See also Liliana Obregón's brief but insightful paper: Liliana Obregón, 'Writing International Legal History: On Overview', *Monde(s)*, 7(1) (2015) 95-112.

¹⁰¹ The locus classicus of this story: Koskenniemi, *The Gentle Civilizer*.

¹⁰² See Oakes, *Weber and Rickert*, chapter 1. Megill, 'Why was there a crisis of historicism?', 416: 'The crisis of historicism can be briefly defined as the concern ... with the allegedly damaging effects of an excessive preoccupation with the methods and objects of historical research. Two such effects were customarily emphasized, namely, a relativism destructive of absolute (or at least prevailing) values, and a focus on the past destructive of commitment to the tasks of the present.'

¹⁰³ See, for wider (and somewhat diverging) accounts of what the crisis of historicism amounted to and what developments contributed to it: Charles R. Bambach *Heidegger, Dilthey and the Crisis of Historicism* (Ithaca: Cornell University Press 1995); Howard, *Religion and the Rise of Historicism*; Herman Paul, 'A Collapse of Trust: Reconceptualizing the Crisis of Historicism', *Journal of the Philosophy of History*, 2 (2008) 63-82.

raised severe doubts against the historicist premise that a science of culture could reproduce reality, and also against the (social scientific) positivist axiom that a system of abstract general laws could map its features.¹⁰⁴ At stake in this crisis-critique of European historicism was not necessarily any concern for those people and places relegated to history's waiting room. Rather, it was a looming confrontation with the practical, ethical, intellectual, and political consequences of Europe's 19th-century transformation—which we habitually gloss as modernity, so poignantly captured in Marx and Engels' poetic dictum: 'All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses, his real conditions of life and his relations with his kind'.¹⁰⁵ *Pace* Marx and Engels' mid-19th century mix of historicism and positivism,¹⁰⁶ however, neither history nor scientific laws of social reality, provided comprehensive meanings or values with which to encounter our real conditions of life. History no longer appeared a stable source of meaning *or* justification for present values, morals, or institutions, or to allow us to divine how we should act towards the emergent future: 'a crisis was faced, rather than caused, by a conception of history that (as late as 1900 ...) served as a worldview by providing moral meaning ... It was the growing insight that ... "motivations for actions" and "orientations on the future" could no longer be unproblematically derived from the past'.¹⁰⁷ Providence and progress were no longer subtended by the lessons of history and no historical *Begründung* for our most cherished ideals could be discovered in these lessons. Indeed, history seemed to be revealed as 'infinite and potentially unmasterable ... [a] voluminous and implicitly relativistic chaos, a state of affairs laid bare (or created) by a century or

¹⁰⁴ Oakes, *Weber and Rickert*, 36.

¹⁰⁵ Karl Marx and Friedrich Engels, *The Communist Manifesto* (1888, transl. Samuel Moore, London: Penguin 1985).

¹⁰⁶ Here we should note Foucault's provocative observation: 'Marxism exists in 19th century thought like a fish in water: that is, it is unable to breath anywhere else.' Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (London: Vintage 1994) 261.

¹⁰⁷ Herman Paul, 'A Collapse of Trust', 74.

more of academic enquiry into the remote past'.¹⁰⁸ The perceived anarchy of values within societies undergoing rapid change—population growth, urbanization, industrialization, the rise of mass parties on the left and right¹⁰⁹—engendered a steady stream of discourses of anxiety and civilizational decline from the turn of the century, accelerated by the unprecedentedly destructive conflict of World War I.¹¹⁰

The consequences of this *Zeitgeist* for European historical jurisprudence and the history of international law as its subfield, do not appear to have been systematically examined. But we can observe from the beginning of the 20th century a decline in a self-consciously historicist and historicizing academic writing in international law; this is sometimes labelled the rise of a positivist science of international law—in contrast to a supposed naturalism—but it is important to note that the late 19th century projects for the codification and 'scientization' of international law did not repudiate historicism and civilizational discourses so much as thoroughly metabolize them, iceberg-like, into a submerged mass of which only certain rule-like emanations were sharply visible.¹¹¹ International law derived its objective rule-like character not exclusively from the subjective will of states, but from its foundation in 'a common legal consciousness that at the same time referred to a deeper dimension. It was a moral and religious one, historically founded and shared in the western world'.¹¹² Oppenheim's lectures on the Future of International Law, as well as the first edition of his

¹⁰⁸ Ghosh, *Max Weber and the Protestant Ethic*, 388.

¹⁰⁹ See Donald Sassoon, *The Anxious Triumph: A Global History of Capitalism 1860-1914* (London: Penguin Random House 2020); Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth Century Europe* (New Haven: Yale University Press 2013).

¹¹⁰ As Adas points out, after World War I, anti-colonial critics of the West's ideology of civilizing mission – one utterly underwritten by 19th century European international legal historicism – received a wider reception in the West: Michael Adas, 'The Great War and the Decline of the Civilizing Mission' in Laurie J. Sears (ed.), *Autonomous Histories, Particular Truths: Essays in Honor of John R. W. Smail* (Madison: University of Wisconsin Press 1993) 101–122; Michael Adas, 'Contested Hegemony: The Great War and the Afro-Asian Assault on the Civilizing Mission Ideology,' *Journal of World History*, 15(1) (2004) 31-63.

¹¹¹ See Nuzzo, *Lawyers, Space and Subjects*.

¹¹² *Ibid* 66.

famous treatise, reflect this dependence of positive rule-oriented legal science on a presupposed civilizational-ethical substance without which rules would lose their justification.¹¹³ Nuzzo concludes that by end of the 19th century, ‘international law appeared as the historical product of an elite of intellectuals’ reflection that through an organic relationship with the civilized nations’ popular conscience, one was able to translate values and aspirations into a scientific system’.¹¹⁴

The inter-war period yielded what Bloxham has called a ‘neo-historicism’¹¹⁵—stripped of optimistic expectations of progress and providence, but nonetheless highly ‘civilizational’ in their framing of the contexts of genesis of social, legal, and economic order *in* history.¹¹⁶ The crises of liberalism—whether national or imperial—yielded a range of competing visions to justify the authority and validity of the state and its internal and external public laws. The legacy of the crisis of historicism’s providential unification of the ‘already’ and the ‘not yet’ in the temporal unfolding of justice, was a deepening divide between a historically- and sociological-minded realism concerning the foundations of legal and political order (in which the historically-determined substance of the political was in some basic sense the truth of law),¹¹⁷ and neo-Kantian and rule-positivist approaches that embedded a weak providentialism in the workings of legal forms and legal institutions—as means of mitigating conflict and of crystallizing the incipient order-possibilities arising from greater

¹¹³ Lassa Oppenheim, *International Law: A Treatise – Volume 1, Peace* (London: Longman 1905) Chapter II. Lassa Oppenheim, *The Future of International Law* (London: Clarendon 1921); Benedict Kingsbury, ‘Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law’ *European Journal of International Law* 13(2) (2002) 401-437; Alfred von Verdross, ‘Forbidden Treaties in International Law: A Comment on Professor Garner’s Report “On the Law of Treaties”’ *American Journal of International Law* 31(4) (1937) 571-577; Santi Romano, *The Legal Order* (1917-1918, transl. and ed. Mariano Croce, London: Routledge 2018).

¹¹⁴ Nuzzo, *Lawyers, Space and Subjects*, 76.

¹¹⁵ Bloxham, *Why History?*, chapter 5.

¹¹⁶ E.g., Oswald Spengler, *The Decline of the West* (1918, transl. Stuart H. Hughes, Oxford: Oxford University Press 1991); Eugen Rosenstock-Huessy, *Out of Revolution: Autobiography of Western Man* (2nd edn., Oxford: Berg 1993).

¹¹⁷ E.g., Otto Hintze, Felix Gilbert, Hermann Heller, Hermann Kantorowicz, Otto Brunner, Carl Schmitt, John H. Herz, Ernst Kantorowicz and Hans J. Morgenthau..

economic and social independence.¹¹⁸ There was also an adjacent interest in looking for the order-giving possibilities of law beyond or below the state through other forms of human association.¹¹⁹ Neither history nor nature seemed to assure stable foundations for human societies and their development, leaving law oscillating between organicism and decisionism, or some combination of both.

By 1945, Europe was in ruins: the second World War had seen ‘the full force of the modern European state ... mobilized for the first time, for *the primary purpose of conquering and exploiting other Europeans*’¹²⁰ rather than the non-European world. Thirty-six and a half million Europeans died from war-related causes between 1939 and 1945,¹²¹ and a further unprecedented destruction of capital stock, city scapes, agricultural land, and livestock. The puzzle could be posed as it was by Judith Shklar: ‘It is not only that no reasonable person can today believe in any “law” of progress ... Rather than look to the future at all, we tend to turn backward and ask ourselves how and why European civilization reached its present deplorable condition’.¹²² Arendt similarly concluded in 1951, that ‘there prevails an ill-defined, general agreement that the essential structure of all civilizations is at the breaking point’ especially ideas of historical progress.¹²³ Historical thinking migrated to the new

¹¹⁸ Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen: Mohr 1928); Alfred Zimmern, *The League of Nations and the Rule of Law, 1918-1935* (London: Macmillan 1945). See discussion of Nikólaos Polítis in Umut Özsü, ‘Politis and the Limits of Legal Form’, *European Journal of International Law*, 23 (2012) 243-253. The French variation was distinctive in its derivation from a ‘sociology of society’, emphasizing law as simultaneously integrating, reflecting and producing the social. See Jack E.S. Hayward, *The Idea of Solidarity in French Social and Political Thought in the Nineteenth and Early Twentieth Century*, PhD thesis, University of London (1958).

¹¹⁹ Such as Pluralism – inspired in part by Gierke but also by guild socialism, and also the visible and tangible breaking up of multinational empires: See David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press 1997); Mira L. Siegelberg, *Statelessness: A Modern History* (Cambridge: Harvard University Press 2020); Natasha Wheatley, ‘Spectral legal personality in interwar international law’, *Law and History Review* 35 (2017) 753-758.

¹²⁰ Tony Judt, *Postwar: A History of Europe Since 1945* (London: William Heinemann 2005) 14.

¹²¹ *Ibid* 17.

¹²² Judith N. Shklar, *After Utopia: The Decline of Political Faith* (text of 1957, Princeton: Princeton University Press 2020), xvii.

¹²³ Hannah Arendt, *The Origins of Totalitarianism* (text of 1951, London: Penguin Random House 2017) ix..

discipline of international relations and its self-declared ‘realists’ (sometimes lapsed international lawyers themselves), with their decidedly anti-utopian and tragic sense of history as a foul rag and bone shop.¹²⁴ Within international law, stories of progressive historical development tended to become *institutional* origin-stories of lessons-learned from past errors,¹²⁵ while the historical work *on* international law appears to have shrunk to a small sub-specialization of legal history undertaken within European law faculties.¹²⁶ Indeed, the very point of writing the history of international law becomes unclear at this juncture: no strong civilizational providence could be claimed to inhere in a *European* culture and history any longer; instead, a weak providentialism *might* be faintly discerned in speculative surveys of ancient rules and practices, medieval institutions, and other sought-for exemplars of a vestigial ‘universal history’ of legal rules and practices.¹²⁷

Within textbooks and other manuals, history was relegated to a brief rehearsal of tidbits from the 17th to 19th centuries, a historical woodshed to be raided for the occasional salutary example of how peace and order could be achieved.¹²⁸ By the time German Jewish émigré and private law scholar Arthur Nussbaum published his *Concise History of the Law of Nations* in 1947,¹²⁹ his

¹²⁴ See Nicolas Guilhot, *After the Enlightenment: Political Realism and International Relations in the Mid-Twentieth Century* (Cambridge: Cambridge University Press 2017) – notable figures being Morgenthau and Herz but also former students of Meinecke such as Gilbert. The historical character of international relations thought was itself only 2 decades-long, replaced by a species of rationalism – see Guilhot, *After the Enlightenment* and Sonja M. Amadae, *Prisoners of Reason: Game Theory and Neoliberal Political Economy* (Cambridge: Cambridge University Press 2015).

¹²⁵ David W. Kennedy, ‘The Move to Institutions’, *Cardozo Law Review* 8(5) (1987) 841-989.

¹²⁶ Ingo J. Hueck, ‘The Discipline of International Law - New Trends and Methods on the History of International Law’, *Journal of the History of International Law*, 3 (2001) 194-217, at 199.

¹²⁷ See Heinhard Steiger, ‘From the International Law of Christianity to the International Law of the World Citizen – Reflections on the Formation of Epochs of the History of International Law’, *Journal of the History of International Law*, 3 (2001) 180-193.

¹²⁸ As pointed out by David W. Kennedy, ‘International Law and the Nineteenth Century: History of an Illusion’, *Nordic Journal of International Law*, 65(3) (1996) 385-420.

¹²⁹ Arthur Nussbaum, *A Concise History of the Law of Nations* (London: Macmillan 1947). For a biographical sketch of Nussbaum in the form of a laudation, see Elliott E. Cheatham, Wolfgang G. Friedmann, Walter Gellhorn, Philip C. Jessup, Willis L. M. Reese and Schuyler C. Wallace, ‘Arthur Nussbaum: A Tribute’, *Columbia Law Review*, 57(1) (1957) 1-7.

lapidary contention was simply that ‘the history of the law of nations is conterminous with the documentary history of mankind’.¹³⁰ The origins of 19th and 20th century international law remain, in this telling, European, and—apart from an inquiry into some ancient civilizations—the cast of characters playing their parts in the development of international law remain preponderantly coeval with Western European political and legal canons, punctuated by some institutional developments such as arbitration and adjudication. The 19th century is singled out for its role in the making of modern international law, but no mention is made of its formative relationship with colonialism or its civilizational vision of a hierarchically arranged world of races and polities. The history of international law was to be an admixture of chronologically-arranged doctrines, political and legal ideas, diplomatic event-history, and founding fathers to whom lesser or greater roles can be attributed; the terminus ad quem was Nussbaum’s present, where the tragedies of the past are assimilated to a cautious hope of progress in the co-operation of nations under international law: ‘Humanity seems headed in the long-run toward a more perfect state of international law. The present generation’s keen awareness of the imperfections of the law of nations itself is a propitious sign’.¹³¹ In contrast with the intense historicism of legal history of a mere 25 years before—a historicism fraught with disputes about the meaning of progress in history, as well as profound contention about the nature and direction of legal change in history, Nussbaum’s history of international law was aloof and irenic, entering into a contentious spirit only in relation to the relative significance of the Scholastics. The temporal unfolding of legally secured relations, to paraphrase Koselleck, remained in some sense the indispensable presupposition of the idea of international law, whatever the charnel house of history itself might prove. The reception of Nussbaum’s book, strikingly, essentially confirmed this anodyne understanding of what the history

¹³⁰ Nussbaum, *A Concise History*, 2.

¹³¹ *Ibid* 3.

of international law amounted to—Wright criticized his light treatment of antiquity and the middle ages,¹³² Sereni took him to task for his approach to certain doctrines and themes,¹³³ and Northrop complained that he failed to appreciate the true contribution of Roman law to universality¹³⁴—but no one questioned the basic point of the exercise. International law’s history was, it seemed, to be either a detailed recounting of legal acts and their contexts, or thumbnail sketches of authors and events to be arranged in a picture-window history for the edification of those passing by on their way to a more perfect state of international law in the near future.

D. Death and Rebirth—The History of International Law after Empire

The morbidity of the history of international law as European historical jurisprudence seemed clear to Alexandrowicz as early as 1963. He complained that ‘there is no longer much interest in the History of International Law as such’, and such writing as there was, was ‘a lifeless repetition of historical slogans about the law of nations’ as having ‘apparently [grown] up among the Christian nations of Europe only’.¹³⁵ Writing from Sydney after a decade of researching and teaching in newly-independent India’s ‘Madras School of Law’,¹³⁶ Alexandrowicz had been a witness and sympathetic fellow-traveller in the epoch-making dissolution of empires and colonies into dozens of new nation-states, accompanied by a rapid ‘delegitimization of any kind of political rule that is experienced as a

¹³² Quincy Wright, ‘A Concise History of the Law of Nations’, *The Journal of Modern History* 20(4) (1948) 341-343, at 343.

¹³³ Angelo P. Sereni, ‘A Concise History of the Law of Nations’, *Yale Law Journal*, 57(3) (1948) 508-513, at 508.

¹³⁴ Filmer S. C. Northrop, ‘A Concise History of the Law of Nations’, *Columbia Law Review*, 48(4) (1948) 662-665.

¹³⁵ Charles H. Alexandrowicz, ‘Some Problems in the History of the Law of Nations in Asia (1963)’ in Jennifer Pitts and David Armitage (eds.), *The Law of Nations in Global History* (Oxford: Oxford University Press 2017) 76-82, at 76-7.

¹³⁶ See Carl Landauer, ‘The Polish Rider, CH Alexandrowicz and the Reorientation of International Law, Part I: Madras Studies’, *London Review of International Law*, 7(3) (2019) 321-352.

subjugation' of a population by alien occupants.¹³⁷ Trusteeship and colonialism went from sacred trusts consecrated by international law, deemed necessary to *serve* the progress of colonized peoples, into illegitimate states of affairs which retarded progress and 'therefore had to be eliminated as quickly as possible'.¹³⁸ Between 1945 and 1965, 67 new states were admitted as members of the United Nations (UN), transforming its membership from overwhelmingly western and European to Asian, African, and Latin American by a substantial majority. In 1960 alone, 17 new states joined the UN, 16 from Africa. The result of this revolution in the membership of the society of states had immense consequences for the content of international law: formerly colonial peoples, hitherto assigned to await Europe's permission to enter into history, wrested the authority to make history for themselves—often through bitter and brutal conflicts with European colonial authorities from Algiers to Jakarta.¹³⁹ Jansen and Osterhammel note that decolonization challenged the 'conceptual underpinnings of the international order'¹⁴⁰: it delegitimized colonialism and racism at the level of international society, and also 'contributed greatly to the process that gradually made the principle of national state sovereignty absolute and uncontested'.¹⁴¹ *Through* international law and international

¹³⁷ Jan C Jansen and Jürgen Osterhammel, *Decolonization: A Short History* (Princeton: Princeton University Press 2017) 1-2.

¹³⁸ Jörg Fisch, *The Right of Self-Determination of Peoples: The Domestication of an Illusion* (transl. Anita Mage, Cambridge: Cambridge University Press 2015) 205.

¹³⁹ See, e.g., Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (New York: Henry Holt 2006); Alistair Horne, *A Savage War of Peace: Algeria, 1954-1962* (London: Papermaca 1996); Matthew Connelly, *A Diplomatic Revolution* (Oxford: Oxford University Press 2003). Cooper notes the startlingly short time span in which different imperial visions of order were eclipsed and replaced: 'Empire was an ordinary fact of political life as recently as 1935, much as slavery had been in the eighteenth century. By 1955, the legitimacy of any colonial empire was very much in questions. By 1965, the colonial game was over. The two most important competitors for global power represented their power in other terms and exercised power by other means. In 1935, some political movements sought to overthrow the colonial order in the name of new nations, but others sought to expand and make meaningful imperial citizenship, while still others dreamed of nation in a diasporic, non-territorial sense. By the 1960s, the nation-state was at last becoming the principal unit of political organization.' Frederick Cooper, *Colonialism in Question: Theory, Knowledge, History* (Berkeley: University of California Press 2005) 232-233.

¹⁴⁰ Jansen and Osterhammel, *Decolonization*, 153.

¹⁴¹ *Ibid.*

institutions, anti-colonial nationalists pursued both state-making *and* ‘world-making’: ‘rather than foreclosing internationalism, the effort to achieve national independence propelled a rethinking of state sovereignty, inspired a far-reaching reconstitution of the postwar international order, and grounded the twentieth century’s most ambitious vision of global redistribution’.¹⁴² The ‘revolutionary attitude’¹⁴³ of the newly decolonized states to the possibilities of international law and international order held out hope that the *true* agent for historical progress in the arenas of peace, development, and equality,¹⁴⁴ would be the peoples of the nascent Third World—the very term evoking the open-ended horizon of revolutionary world-making potential attributed to the Third Estate.

The ‘darker nations’¹⁴⁵ now claimed not only their equal rights to sovereign statehood in the present, but also revisited international law’s historical justification for their exclusion: anti-colonial international lawyers—when not directly participating in the new states’ efforts to recast the international legal order to register the priorities and concerns of the third world—also revisited the exclusion of non-European empires and civilizations from international legal history’s account of its

¹⁴² Adom Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton: Princeton University Press 2019) 3.

¹⁴³ Georges Abi-Saab, ‘The Newly Independent States and the Rules of International Law: An Outline’, *Howard Law Journal*, 8 (1962) 95-121.

¹⁴⁴ See, for example, the importance of the decolonized States’ legal activism in the General Assembly, in refining and strengthening the prohibition on the use of force: Nehal Bhuta and Rebecca Mignot-Mahdavi, ‘Dangerous Proportions: Means and Ends in Non-Finite War’ in Nehal Bhuta, Florian Hoffmann, Sarah Knuckey, Frédéric Mégret (eds.), *The Struggle for Human Rights: Essays in Honour of Philip Alston* (Oxford: Oxford University Press 2021); Samuel Moyn and Umut Özsu in Jorge E. Vinuales, (ed.), *The UN Friendly Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge: Cambridge University Press 2020).

¹⁴⁵ Vijay Prashad, *The Darker Nations: A People’s History of the Third World* (London: New Press 2008).

lineage. From Anand¹⁴⁶ to Syatauw,¹⁴⁷ Bedjaoui¹⁴⁸ and Elias,¹⁴⁹ the first significant rebirth of the history of international law¹⁵⁰ from its post-war European death was a direct by-product of what Baxi called their ‘verbal vendetta against the so-called European international law’,¹⁵¹ concerned to demonstrate the equal and authoritative contribution—or historically-possible contribution—of a range of non-European civilizations to a universal international law.¹⁵² Influenced by the New Haven School (where each completed his PhD dissertation under McDougal’s supervision), both Anand and Syatauw argued that the transformation of international society effected by decolonization also necessitated a transformation in the value foundations of the international legal order.¹⁵³ The discernment of the values which must be made fundamental to a new international law, was achieved in no small part by revisiting the political histories of Asian political societies and their legal-political relationships, as well as by an assessment of the contemporary economic and political condition of post-colonial states. Bedjaoui’s vigorous defence of the legal personality of the Algerian

¹⁴⁶ Ram P. Anand (ed.), *Asian States and the Development of Universal International Law* (New Delhi: Vikas 1972); Ram P. Anand, *International Courts and Contemporary Conflict* (New Delhi: Asia 1974); Prabhakar Singh, ‘Reading RP Anand in the Post-Colony’ in Jochen von Bernstorff and Philipp Dann (eds.), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford: Oxford University Press 2019) 297-317.

¹⁴⁷ Jacob J.G. Syatauw, *Some Newly Established Asian States and the Development of International Law* (Leiden: Nijhoff 1961).

¹⁴⁸ Mohammed Bedjaoui, *Law and the Algerian Revolution* (Brussels: International Association of Democratic Lawyers 1961); Umut Ozsu, ‘Determining New Selves: Mohammed Bedjaoui on Algeria, Western Sahara and Post-Classical International Law’ in von Bernstorff and Dann (eds.), *The Battle for International Law*, 341-379.

¹⁴⁹ Taslim O. Elias, *Africa and the Development of International Law* (Leiden: A. W. Sijthoff 1972); Carl Landauer, ‘Taslim Olawale Elias: From British Colonial Law to Modern International Law’, in von Bernstorff and Dann, *The Battle for International Law*, 318-340.

¹⁵⁰ As Liliana Obregon has noted, there was a somewhat similar dynamic in the late nineteenth and early twentieth century in Latin America, in which jurists insisted first on Latin American states’ equal *civilized* status, and second, developed a regional practice and discourse which reflected an autochthonous theory, practice and doctrine of a law of nations, exemplified in the repudiation of the standard of civilization of statehood found in the 1932 Montevideo Convention: Obregon, ‘Peripheral Histories?’. See Arnulf B. Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (Cambridge: Cambridge University Press 2015) and Juan P. Scarfi, *The Hidden History of International Law in the Americas: Empires and Legal Networks* (New York: Oxford University Press 2017).

¹⁵¹ Upendra Baxi, ‘Some Remarks on Eurocentrism and the Law of Nations’ in Anand, *Asian States*, 3-9, at 5.

¹⁵² See also Samuel Moyn, ‘The High Tide of Anticolonial Legalism’, *Journal of the History of International Law*, 54(2) (2020) 5-31.

¹⁵³ E.g., Anand, *International Courts*, 396 and Syatauw, *Some Newly Established Asian States*, 34ff.

revolutionary movement, and the lawfulness of its armed struggle against France, began with a detailed contestation of the historical claim that the Algeria was not a state under international law before 1830, or that it have ever been lawfully annexed.¹⁵⁴

The recovery of doctrines and practices as part of a wider recounting of global zones of encounter between historical political orders (empires, kingdoms, principalities), each developing relatively indifferently to each other until drawn into uneasy coexistence, and ultimately competition with, and domination by, Europe, was the heart of Alexandrowicz's substantial and erudite corpus.¹⁵⁵ At stake was an *empirical* repudiation of 19th century historicism's Eurocentric ideal of universal law and civilization as having only ever been a 100-year conceit, within a narrowed vision of international law as positive European legal acts reflecting the will of European sovereigns. Alexandrowicz's belief in the inter-civilizational openness of the early modern European natural law jurists (such as Grotius) has been challenged,¹⁵⁶ but the *political* stakes of his historical work were evident for all to see: the end of formal colonialism now brought forward the possibility a truly universal law of international community, reflecting its reconstituted membership and their civilizational legacies, reviving the content of natural law doctrines made real once more after the 19th-century Eurocentric hiatus.¹⁵⁷

The recovery of this inter-polity practice from the 16th, 17th and 18th century encounters between European and non-European political orders signalled a hoped-for reconciliation of universal law and universal history in the anti-colonial present.¹⁵⁸ Moyn notes that this interest in 'the

¹⁵⁴ Bedjaoui, *Law and the Algerian Revolution*, chapters 1-2.

¹⁵⁵ Pitts and Armitage, *Law of Nations*.

¹⁵⁶ See Pitts and Armitage, *Law of Nations*, 1-32; Pitts, *Boundaries*.

¹⁵⁷ See Charles H. Alexandrowicz, 'New States and International Law (1974)' and 'The Charter of Economic Rights and Duties of States' in Pitts and Armitage, *The Law of Nations*, 404-410; 411-413.

¹⁵⁸ Landauer astutely observes that this narrative of declension (from early modern jus natural universalism to Eurocentrism) and renewal through the rise of the Third World, was itself a romantic trope: Carl Landauer, 'CH Alexandrowicz and the Reorientation of International Law, Part II: Declension and the Promise of Renewal', *London Review of International Law* 9(1) (2021) 3-36, at 30.

search for reasons to think that the peoples of the world had once engaged in lawmaking on an equal (or more equal) footing' was 'widespread' as 'decolonizing international lawyers were often quite insistent that the inequality of peoples canonized in international law as a result of modern empire had been the exception rather than the norm'.¹⁵⁹ Within Europe, some persisted in one version or another of the view that international law as both essentially a European civilizational achievement¹⁶⁰ and that it was already universal. But for the most part, European legal history travelled a different and circuitous path,¹⁶¹ in which international law occupied even less significance.¹⁶²

Studies in antiquity and the Middle Ages, implicating the nature of what we might today call inter-polity legal relations, continued, while Stolleis revisited the 18th and 19th centuries in a dispassionate inquiry into German public law and its connection with Germany's particular natural-law ideas of state science. Fisch, notably, studied the legal mechanisms of European colonialism from 1500 with a sober and critical eye to the role of law in justifying and enabling European expansion, employing both a legal-historical and political historical approach.¹⁶³ He would later expand his interest to the history of the concept of self-determination in public and international law. In French, the work of Peter Haggemacher pioneered a rigorous revisiting of Gentili, Grotius, Vitoria, Vattel and other less well-known early modern *jus gentium* and *jus naturale* writers. Haggemacher's meticulous and weighty reconstruction of the origins of the just war doctrine,¹⁶⁴ and other essays exploring the early modern legal thought of what he called the 'extraterritorial legal

¹⁵⁹ Moyn, *The High Tide*, 15.

¹⁶⁰ Jan H. W. Verzijl, *International Law in Historical Perspective* (Leiden: Sijthoff 1969, 10 vols.) follow essentially a doctrinal history of European, and later North American, legal acts.

¹⁶¹ See Duve, 'German Legal History'; 'What Is Global Legal History?'

¹⁶² Hueck, 'The Discipline'.

¹⁶³ Jörg Fisch, 'Nationalsprache und Volksbildung in Indonesien', *Internationale Schulbuchforschung*, 6(3-4) (1984) 301-310.

¹⁶⁴ Peter Haggemacher, *Grotius et la doctrine de la guerre juste* (Paris : Presses universitaires de France 1983).

order',¹⁶⁵ recovered the discontinuities as much as the continuities of this vein of legal writing with contemporary international law. Its nuance and comprehensiveness would ensure that it remained an indispensable starting place for the next generation of scholars (lawyers and historians) turning to the history of international law, the history of international political thought, and the history of global legal ordering, from 1990 onwards.

One of the few works emerging from the English-speaking world in the late 1980s was Stephen Neff's *Friends but No Allies*,¹⁶⁶ which recounts the liberal ideal of free trade as a partial and one-sided cosmopolitanism of the West and its allies, and searches in the history of international law to discern the possibility of a more robust idea of an institutionalized global economic order that would realize a true economic cosmopolitanism. Strikingly, Neff maintains that the historical alternative to liberal free trade is to be found in the New International Economic Order's 'grand manifesto for a social democratic system of world economic order',¹⁶⁷ but its implementation was being thwarted by Western dominated institutions such as the IMF and World Bank. For Neff, perhaps like Nussbaum, the distant and the recent pasts of international law—for all their folly, power-politics, and rapacious self-interested action—always reveals the possibility of a direction of travel towards a more universal legal, political, and economic order in which the kernel of an ancient natural law of human flourishing can be discerned.¹⁶⁸ Carty's *The Decay of International Law* declared itself to be a 'contribution to theory' rather than a history of any kind.¹⁶⁹ But along the way to trying

¹⁶⁵ Peter Haggemacher, 'Hugo Grotius (1645)' in Fassbender and Peters, *The Oxford Handbook of The History of International Law*, 1098-1100.

¹⁶⁶ Stephen C. Neff, *Friends but No Allies: Economic Liberalism and the Law of Nations* (New York: Columbia University Press 1990).

¹⁶⁷ *Ibid* 191.

¹⁶⁸ This has been a consistent feature of Neff's approach to the history of international law: see, for example, Stephen C. Neff, *Justice Among Nations: A History of International Law* (Cambridge: Harvard University Press 2013).

¹⁶⁹ Anthony Carty, *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester: Manchester University Press 1986) 20-21.

to reconstruct the methods of international legal argument about concepts such as custom, territory, and self-determination, Carty reached backwards into 19th century European international legal texts, revealing these concepts' deep indebtedness to European historical jurisprudence and in particular to followers of Savigny.¹⁷⁰ In this Carty was perhaps one of the first to resurface, albeit somewhat obliquely, the extent to which international legal thought was a 19th century European project.

E. Our Perpetual Present-Past

Moyn describes the anti-colonial legalists of the 1960s as 'the last Hegelians', noting wistfully that their visions of a reconciled true universality *in history*—which shaped many fields of international law, including human rights,¹⁷¹ state succession, trade and investment, and the use of force, between 1960 and 1980—'all came to naught'.¹⁷² Their attempt to 'de-racialize and globalize a tradition that had prioritized collective freedom in and through the state' failed, undermined from the outset by armed interventions, political intrigue, economic pressures, and efforts by major powers to maintain means of proxy influence and control; and besieged from the late 1960s by rapidly changing economic conditions, debt crises, and civil conflict.¹⁷³ An ascendant neo-liberal economic, political, and legal project, gestating in academia and other institutions for at least two decades,¹⁷⁴ upended

¹⁷⁰ Ibid, chapters 3-4.

¹⁷¹ See the recent volume edited by Dirk A. Moses, Marco Duranti and Roland Burke, *Decolonization, Self-Determination and the Rise of Global Human Rights Politics* (Cambridge: Cambridge University Press 2020).

¹⁷² Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (New York: Farrar, Straus and Giroux 2021) 25.

¹⁷³ See Nils Gilman, 'The New International Economic Order: A Reintroduction', *Humanity* 6(1) (2015) 1-16; Niall Ferguson, *The Shock of the Global: The 1970s in Perspective* (Cambridge: Harvard University Press 2010)..

¹⁷⁴ In some sense the intellectual and social history of neo-liberalism's *victory* in specific national and global contexts is only now being written: See, among recent contributions: Sarah Babb, *Managing Mexico: Economists from Nationalism to Neoliberalism* (Princeton: Princeton University Press 2018); Rawi Abdelal, *Capital Rules: The Construction of Global Finance* (Cambridge: Harvard University Press 2007); Binyamin Applebaum, *The Economists' Hour: False Prophets, Free Markets, and the Fracture of Society* (New York: Little, Brown and Company 2019); Stephanie L. Mudge, *Leftism Reinvented: Western Parties from Socialism to Neoliberalism* (Cambridge: Harvard University Press 2018); Zachary D. Carter, *The Price of Peace: Money, Democracy and the Life of John Maynard Keynes* (New York: Penguin Random House 2020); Lemann, *Transaction Man: The Rise of the Deal and the Decline of the American Dream* (London: Macmillan 2019); Rick Perlstein, *Reaganland: America's Right Turn 1976-1980* (New

the domestic and international post-war political-economic regimes, from national welfarism to financial and corporate regulation.¹⁷⁵ The 1989 collapse of the Soviet Union and its Eastern European empire bookmarked a moment in which the accelerating liberalization of trade and capital flows, and a wider financialization of the economy,¹⁷⁶ was cheered on by a renewed vulgar historicism in which the adoption, diffusion, or even imposition, of Western political, economic, and legal orders were identified as the key to the realization of progress in history—peace, prosperity, and human rights.¹⁷⁷ A resurgently self-confident liberal democratic west—economically ascendent and seemingly politically victorious over its greatest ideological competitor—could claim once again to be the *sole* normative and empirical exemplar to other nations and peoples seeking the same outcomes.¹⁷⁸ Enjoying its longest continuous peace in history, Western Europe could slough off the shadow of being ‘the dark continent’¹⁷⁹ and revel in a Kantian dream come true: an integrated legal order of liberal democratic states, whose rapid expansion to the East was at once a civilizational project and a pronounced victory of legal ideas over political substance.¹⁸⁰ Technological change and

York: Simon & Schuster 2020); Paul Sabin, *Public Citizens: The Attack on Big Government and the Remaking of America* (New York: WW Norton 2021).

¹⁷⁵ See Gérard Duménil and Dominique Lévy, *The Crisis of Neoliberalism* (Cambridge: Harvard University Press 2011).

¹⁷⁶ Ibid; Gérard Duménil and Dominique Lévy, *Capital Resurgent: Roots of the Neoliberal Revolution* (transl. Derek Jeffers, Cambridge: Harvard University Press 2004);

¹⁷⁷ Notoriously, Francis Fukuyama’s *The End of History and the Last Man* (New York: Free Press 1992) and Thomas L. Friedman’s *The World is Flat: A Brief History of the Twenty-First Century* (New York: Farrar, Straus and Giroux 2005), but permeating also economic history, political science and economics: for a skeptical retrospect, see Adam Przeworski, ‘Do Institutions Matter?’, *Government and Opposition*, 39(4) (2004) 527-540 and Adam Przeworski, ‘The Last Instance: Are Institutions the Primary Cause of Economic Development?’, *Archive of European Sociology*, 45(2) (2004) 165-188; for a reading of this literature in the context of peace-making and state-building in the 1990s, see Nehal Bhuta, ‘Against State-Building’, *Constellations*, 15(4) (2008) 517-542. For a critique from an American conservative, see Andrew J. Bacevich, *The Age of Illusion: How America Squandered its Cold War Victory* (New York: Metropolitan Books 2020).

¹⁷⁸ On the rivalrous exemplarism of the US and USSR, see Odd A. Westad, *The Global Cold War* (Cambridge: Cambridge University Press 2005).

¹⁷⁹ Mark Mazower, *The Dark Continent: Europe’s Twentieth Century* (London: Allen Lane 1998).

¹⁸⁰ The fragility of this Eutopian dream is dissected in Ivan Krastev and Stephen Holmes, *The Light that Failed: A Reckoning* (New York: Penguin Random House 2020) and is subject to a bewildered postmortem by Anne Applebaum, *The Twilight of Democracy: The Failure of Politics and the Parting of Friends* (London: Penguin 2020). For

deepening economic integration over the final decade of the 20th century produced the distinctive experience of an acceleration of the rate of change in social, political and economic life.¹⁸¹

Writing at the very end of the twentieth century to inaugurate the new *Journal of the History of International Law*, Canadian jurist and former European Court of Human Rights judge, Ronald St. John Macdonald (aged 71 at the time) lamented that ‘the history of international law had been neglected for many years’, and declared with a patrician gentility that the purpose of the journal was to ‘contribute to the effort to make intelligible the international legal past, however varied and eccentric it may be, to stimulate interest in the whys, the whats and wheres of international legal development, without projecting present relationships on the past, and to promote the application of a sense of proportion to the study of modern international legal problems’.¹⁸² The opening essay of the first issue, by Philip Allott, augured the providential possibility of rediscovering the history of international law as a history of societal consciousness:¹⁸³ ‘The writing of the intrinsic history of international law—the history of the law itself—will reform our consciousness of the identity, the functioning, and the potentiality of international law as law. The writing of the extrinsic history of international law—its relationship to the history of other social phenomena —will reform our

a concrete and careful reflection on what neoliberal restructuring amounted to in Russia, see Stephen J. Collier, *Post-Soviet Social* (Princeton: Princeton University Press 2011).

¹⁸¹ Hartmut Rosa, *Social Acceleration: A New Theory of Modernity* (New York: Columbia University Press 2013) 301. Rosa’s definition of social acceleration is compact and useful: “the acceleration of social change” means the following: the intervals of time for which one can assume stability in the sense of a general congruence of the space of experience and the horizon of expectation (and hence a secure set of expectations) progressively shrink in the various domains of society, whether these are understood in terms of values, functions, or types of action, although this shrinkage neither occurs in a unilinear way nor at the same tempo across the board. *Thus the acceleration of social change can be defined as the increase of the rate of decay of action-orienting experiences and expectations and as the shortening of the periods of time that are defined as “the present” in the respective spheres of society.*

¹⁸² Ronald St J. Macdonald, ‘Editorial’, *Journal of the History of International Law*, 1(1) (1999) 1-6.

¹⁸³ Philip Allott, ‘International Law and the Idea of History’, *Journal of the History of International Law* 1(1) (1999) 1-21.

consciousness of the role of international law in the forming, re-forming, and remaking of international society'.¹⁸⁴

Awakening from deep slumber, the Rip van Winkle of international legal history opened its eyes to a world transformed. Although one notion of international legal history looked to recover its relationship as scribe and augur of world-historical processes, already by the 1999 founding of the *Journal*, a critical and disillusioning perspective on the claimed historical lineages of a triumphal Western present, had begun to emerge. Well before international legal history's post-2000s 'boom', the Harvard-centric 'New Approaches to International Law' network of scholars had begun to challenge the weak providentialism of international law as a means and an end of progress.¹⁸⁵ Kennedy's 1987 book-length article on the Move to Institutions¹⁸⁶ reprised (almost ad nauseum) the *historical* claims—eminently practical pasts—made to legitimate and authorize international institutions, reflecting on these claims as immanent to the wider field of discourses that structure the range of available positions one may take as an international lawyer at any moment in time. In Kennedy's work, historical narrative and historical claims are discourses like any other, deployed to inflate or deflate the authority of a professional vocabulary and buttress the persona of a professional habitus; writing a different history, or writing history at all, was irrelevant to his endeavour.¹⁸⁷ Some of his students, however, were concerned to *advance historical claims* about international law and its structuring provenances and problematics, and to trace the histories of some of its significant legal-conceptual formations and institutional thought-constellations

¹⁸⁴ Ibid 20.

¹⁸⁵ Deborah Z. Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law', *Nordic Journal of International Law*, 65 (1996) 341-383. Exactly how international law – chastened by political realist critique and diminished in post-war positivist legal theory to mere positive morality – came once more to be associated with liberal idealism in the United States and beyond, is an intellectual history that remains to be reconstructed.

¹⁸⁶ Kennedy, 'Move to Institutions'.

¹⁸⁷ See David W. Kennedy, 'When Renewal Repeats', *Left Legalism/Left Critique*, 1 (2020) 373-419 and 19th century, Kennedy, 'History of an Illusion'.

(interleaved with some discussions of institutional histories and practices). Most notable¹⁸⁸ were a series of articles published by Anthony Anghie from 1996 to 2002, published in revised form in his 2005 book, *Imperialism, Sovereignty and the Making of International Law*. Bringing together disparate dimensions of a critical sensibility that connected the anti-colonial repudiation of civilizational concepts in international law with post-colonial studies' interests in discourses of colonial and imperial rule, and their extensive lineage in canons of Western political and moral thought, Anghie's work was published in book form in the aftermath of the invasions of Afghanistan and Iraq and in the midst of a renewal of a strongly civilizational neo-trusteeship discourse addressing the limits of sovereignty in circumstances of state failure;¹⁸⁹ a crucial axis of this discourse was also the racialized critiques of Islamic religious law and practice, and of the failures of Arab governance since decolonization.¹⁹⁰ The parallels with Anghie's recovery of the central role of imperialism and colonialism in the fundamental legal-conceptual vocabularies and governance ideals of early modern and 19th century international law were hard to miss. Various pillars of late-20th century liberal internationalism—mainstays of 1990s US foreign policy thinking¹⁹¹ such as economic liberalization, democracy-promotion, human rights-promotion, humanitarian intervention, and atrocity prevention—emerged in the rear-view mirror as a cohesive and historically-recognizable imperial project, lending a strong sense of urgency to the recovery of our recent imperial and colonial pasts' relationship with our present legal imagination. Gerry Simpson's 2004 book, *Great Powers and Outlaw*

¹⁸⁸ Important also are Berman's articles on nationalism from the early 1990s. See: Nathaniel Berman, *Passion and Ambivalence: Colonialism, Nationalism and International Law* (Leiden: Brill 2012).

¹⁸⁹ See Nehal Bhuta, 'Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order' in Kevin Davis, Angelina Fisher, Benedict Kingsbury, and Sally E. Merry (eds.), *Governance by Indicators: Global Power Through Quantification and Rankings* (Oxford: Oxford University Press 2012) 132-161.

¹⁹⁰ See review and critique found in Mahmood Mamdani, 'Good Muslim, Bad Muslim: A Political Perspective on Culture and Terrorism', *American Anthropologist* 104(3) (2002) 766-775, and Mahmood Mamdani, *Saviours and Survivors: Darfur, Politics, and the War on Terror* (London: Verso 2009).

¹⁹¹ See Derek Chollet and James Goldgeier, *America Between the Wars: From 11/9 to 9/11* (New York: Little, Brown and Company 2008).

States, astutely refracted the 1990s discourses of rogue states and humanitarian intervention through 19th and 20th century legal discourses of political and juridical hierarchy in international order, and presciently indicated the extent to which great powers shape the normative stakes of international order and the meanings given to its rules governing lawful violence and its ends. The result, for the 2004 reader of his book, is a sense that ‘we have been here before’, and also the sense that the past can provide some clues in the present as to where we might be going.

Koskenniemi’s *Gentle Civilizer* (published before the Iraq War but after the attacks of September 11 and the invasion of Afghanistan) rendered imperial and colonial projects—along with other intra-European elite projects such as peace and the humanization of (European) war—at the heart of late 19th century European discourses of international law, and as indispensable to international law’s disciplinary ideal of being a means and end of progress in history. Narrated with great flair, and kaleidoscopically detailed and evocative of ‘people with projects’,¹⁹² *The Gentle Civilizer* was an inimitable and in many ways genre-defying text, that recovered and placed into relation innumerable major and minor figures and their writings. As such, it not only broke dramatically with what had been understood to be genre of ‘the history of international law’ up to that moment, but also—through its prodigious source material and juxtapositions—opened multiple lines of inquiry that would be pursued by others.¹⁹³ Innovative in its deployment of intellectual historical methods alongside prosopography, while drawing extensively on secondary sources from imperial, legal, and political histories, *The Gentle Civilizer* was distinguished by its wide potential audience: a whole new

¹⁹² Andrew Lang and Susan Marks, ‘People with projects: writing the lives of international lawyers’, *Temple International and Comparative Law Journal* 27(2) (2013) 437-454.

¹⁹³ See, for example, the interest in examining the formation of national professional associations of international law as a means to grasp the construction of the discipline, or the pursuit of intertwined histories of ideas with biographical accounts of major and minor figures, such as: Vincent Genin, *Le laboratoire belge du droit international: Une communauté épistémique et internationale de juristes (1869–1914)* (Bruxelles: Académie Royale des Sciences des Lettres et des Beaux-Arts de Belgique 2018); Paolo Amorosa, *Rewriting the History of the Law of Nations: How James Brown Scott Made Francisco de Vitoria the Founder of International Law* (Oxford; Oxford University Press 2019).

generation of international lawyers, certainly, many probably reading it as their first encounter with what the ‘history of international law’ could reveal and teach them, but also historians of European public law, international and imperial historians who were increasingly turning their attention to the role of lawyers and legal ideas,¹⁹⁴ and intellectual historians and historians of political thought intrigued to find what they understood to be *political and social theoretical thinkers* (Durkheim, Schmitt, Morgenthau, to name a few) cast in an international legal *dramatis personae*.

The *Gentle Civilizer* can, without too much hyperbole, be seen as a powerful detonator of the explosive growth in scholarship concerning the history of international law; but the width of its blast radius cannot be explained by the text alone. By the time the *Gentle Civilizer* had published, disciplinary preoccupations within academic history (Chakrabarty’s ‘cloistered history’) had already shifted to reflect much greater interest in the lineages of contemporary international political discourses and a wide-range of economic, institutional, cultural, and legal transformations occurring under the ‘now-concept’¹⁹⁵ of globalization. Moreover, several cycles of transformation and critique *within* different subfields of history were presupposed by the prolific interest in the global, international, and imperial, and its law-related objects and subject. Closely conjoined with anti-colonial legal scholars’ recovery of a differently-constituted universality of civilizations in the immediate aftermath of decolonization, the first generation of post-imperial and post-colonial nationalist historiography tended to find deep historical roots for newly-decolonized nation-states’ national projects, often through the historical categories and conceptual armatures of European thought.¹⁹⁶ As Chatterjee remarked in 1986, ‘even as [Nationalism] challenged the colonial claim to political domination, it also accepted the very intellectual premises of “modernity” on which colonial

¹⁹⁴ E.g., Mark Mazower, *Governing the World: The History of an Idea* (London: Penguin 2012).

¹⁹⁵ Alan Megill, ‘Globalization and the History of Ideas’, *Journal of the history of ideas*, 66(2) (2005) 179-187.

¹⁹⁶ E.g., Bedjaoui, *Law and the Algerian Revolution*.

domination was based'.¹⁹⁷ Nationalist historiographies provoked in some places powerful post-colonial rejoinders and counter-histories, unsettling the modernist horizons of post-imperial national histories and also criticizing the ruling elites' national projects as reproducing structures of domination (economic, institutional, and conceptual) inherited from colonial rule.¹⁹⁸ Imperial history in the west after decolonization ceased to be a history of the formal expansions of empire and its imperial acts, and began to interrogate recent European empires' self-interpretation and self-referential concepts of civilization—examining 19th and 20th century European colonialism as extensive and intensive processes that shaped almost every aspect of the modern world, both within the metropole and within the colony. Social, cultural, and intellectual historical methods—themselves rising to prominence and contestation during diverse disciplinary trends between 1950 and 2000—were increasingly brought to bear on a very wide range of phenomena connected to the imperial and the colonial.¹⁹⁹ As Ghosh helpfully summarizes,

This 'new' world history is increasingly shaped by our urgent need to understand and historicize our own globalized condition from the perspective of many locals. ... The new global/imperial history presumes a de-centered narrative in which there was no one driving force but rather multiple and unmanageable systems, processes, imaginaries, and contingent events that pushed a diversity of nations, empires, and communities; [This iteration] of world history offers agency, subjectivity and history to those who participated in a global economy and ecumene, and it fundamentally

¹⁹⁷ Partha Chatterjee, 'Transferring Political Theory: Early Nationalist Thought in India', *Economic and Political Weekly*, 21(3) (1986) 120-128.

¹⁹⁸ Notably, various authors in the Subaltern Studies group: Ranajit Guha, Dipesh Chakrabarty, Gayatri Spivak, Gyan Pandey, Sudipta Kaviraj, and Partha Chatterjee; but see also the scholars associated with Ashish Nandy's Centre for the Study of Developing Societies (Delhi), the Ugandan Makerere Institute, and the Dar es Salaam group of Samir Amin, Andre G Frank, Immanuel Wallerstein and Giovanni Arrighi. For a reflection on the lasting impact of these schools of thinking on the histories of imperialism after 1950, see the essay by the late Patrick Wolfe, 'History and Imperialism: A Century of Theory, from Marx to Postcolonialism', *American Historical Review*, 102(2) (1997) 388-420. For critique of the end point of these critiques, and their blind spots, see Frederick Cooper, *Colonialism in Question: Theory, Knowledge, History* (Oakland: University of California Press 2005).

¹⁹⁹ See, for example, the brilliant cultural history of Britain's early twentieth century empire in the Middle East, Priya Satia, *Spies in Arabia: The Great War and the Cultural Foundations of Britain's Covert Empire in the Middle East* (Oxford: Oxford University Press 2008), and Joseph Massad's account of the making of Jordan's state and nation: Joseph A. Massad, *Colonial Effects: The Making of National Identity in Jordan* (New York: Columbia University Press 2001).

destabilizes the longstanding binaries of subjection and dominance in a range of historiographies between metropole and colony ... Europe and non-Europe.²⁰⁰

One consequence of this pluralizing sensibility of inquiry into the imperial, colonial, and global—and its many lineages of influence on so much of our now-time’s structure of attitude and reference²⁰¹—was a greater appreciation of the self-aggrandizement of the 19th century Eurocentric narrative of empire and colony: on a larger canvas of empires in world history, many of which lasted centuries, if not millennia, ‘the new ones ... of the French, British and Belgians, lasted only decades’.²⁰² Over a longer chronology, the presumption that Europe must be the center of the study of imperial formations, and their various modalities of inter-polity normative ordering, looked shaky indeed.²⁰³ Pioneering in developing this insight in the direction of a *global* legal history, was Lauren Benton’s 2002 book *Law and Colonial Cultures*.²⁰⁴ Extending global historical approaches to develop an account of ‘global legal politics’, Benton’s original and field-shaping book traced the complicated and recursive relationship between multiple legal orders, as they clashed, rivalled one another, and interacted competitively and cooperatively *in situ* in metropolitan and colonial spaces. The picture drawn in the book defies easy synopsis, but it demonstrates extensively that the apparently discrete categories and taxonomies on which our 20th century concept of an ‘international legal order’ were erected—state, territory, sovereignty—emerged through a continuously played out ‘global legal

²⁰⁰ Durba Ghosh, ‘Another Set of Imperial Turns?’, *American Historical Review*, 117(3) (2012) 772-793, at 779.

²⁰¹ Edward W. Said, *Culture and Imperialism* (London: Chatto & Windus 1993) introduction, chapter 1, chapter 8.

²⁰² Cooper, *Colonialism in Question*, 157.

²⁰³ Jane Burbank and Frederick Cooper, *Empires in World History: Power and the Politics of Difference* (Princeton: Princeton University Press 2010); John Darwin, *After Tamerlane* (London: Allen Lane 2007). Sanjay Subrahmanyam, *Empires between Islam and Christianity: 1500-1800* (SUNY Series in Hindu Studies, Albany: SUNY Press 2020); Muzaffar Alam and Sanjay Subrahmanyam; *Writing the Mughal World: Studies on Culture and Politics* (New York; Columbia University Press 2011); Sanjay Subrahmanyam, *Courty Encounters: Translating Courtliness and Violence in Early Modern Eurasia* (Cambridge: Harvard University Press 2012); Cyrus Schayegh, *The Middle East and the Making of the Modern World* (Cambridge: Harvard University Press 2017).

²⁰⁴ Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge: Cambridge University Press 2002).

politics’ in which ‘[intra-colonial] jurisdictional disputes, struggles over the legal status of cultural and legal intermediaries, conflicts over the definitional and control of property’²⁰⁵ shaped a global cultural politics centering on rules about law. Benton later extended the implications of this approach to develop the concept of ‘interpolity law’ as an object of historical inquiry. More capacious and diverse than ‘international law’ (and indeed, highlighting the parochialism and Eurocentrism of the latter as an object of inquiry), researching ‘interpolity law’ endeavours to examine the ways in which global legal politics produced complex legal spaces and repertoires of legal thought and action, involving legal relationships ‘among a range of political communities, including empires, micro-states, and various corporate communities, such as merchant diasporas, trading companies and municipalities’. When we take such a lens of inquiry into the historical past of law and its subjects and objects, we see that

The early modern period teems with pluri-political formations ... Interpolity zones often developed within one or more imperial spheres of influence, including some under the sway of non-European empires, and those formations ... were fluid and surprisingly stable over time. In the long nineteenth century, the period from roughly 1780 to 1920, these formations changed in ways that helped to produce conditions conducive to the rise of the interstate order. A handful of ascendant world powers ... attempted to assert dominance over regional interpolity zones and to construct global prohibition and treaty regimes ... And polities within or on the edges of empires maneuvered to defend sovereign or quasi-sovereign rights, as did confederations and other pluri-political formations that emerged to counterbalance imperial power.²⁰⁶

Empires are always empires of the mind, as well as of people and places, projections from inner space that depend on ‘ocean-crossing ideological constructs’,²⁰⁷ in which discourses of justice, right, and law are fundamental dimensions. No empire ever existed without normative orderings and

²⁰⁵ Ibid 263-264.

²⁰⁶ Lauren Benton, ‘Interpolity Law’ in Mlada Bukovansky, Edward Keene, Maja Spanu, and Christian Reus-Smit, (eds.), *Oxford Handbook of History and International Relations* (Oxford: Oxford University Press 2022).

²⁰⁷ Cooper, *Colonialism in Question*, 237.

their justifications. Emergent currents of imperial and colonial history overlapped with—and no doubt influenced and were influenced by—a contemporaneous revival of international intellectual histories. Armitage points out that mid 20th century disciplines such as international relations thought absorbed and were nourished by a strong connection with the history of political and legal thought (part of the entropy of German historicism and its crisis).²⁰⁸ Delivered initially as the Carlyle Lectures in the Hilary Term of 1991—as the US-led war against Iraq was unfolding and heralded by many as inaugurating welcome new possibilities for the UN-authorized military enforcement of international legal norms²⁰⁹—Richard Tuck’s *The Rights of War and Peace*²¹⁰ made early modern and Enlightenment discourses of just war and international order, and their relationship with Europe’s imperial and colonial expansion, a newly fertile object of inquiry in the history of political thought. Armitage’s own early book took the ideological origins of empire as its principal concern,²¹¹ showing it to be a construct in which discourses of ‘political thought’, ‘legal thought’, and ‘religious thought’ merge into a capacious and effective frame of European ‘international political thought’²¹² that was an indispensable scaffolding for emergent projects of colonization, empire, and state-building within and without Europe. Between 1991 and 2021, intellectual history—including, but not limited to, the history of political thought in Europe—has dug deeply into a rich vein of texts and contexts that reveal the constitutive relationship between jus gentium and jus natural discourses, and the ‘ocean-crossing’ ideational, normative, and material constructs that contributed towards an imperial and

²⁰⁸ Armitage, ‘In Defense of Presentism’, 233-236. Armitage refers rightly to the significance of such figures as ‘Hannah Arendt, Raymond Aron, Herbert Butterfield, Hans Morgenthau, Reinhold Niebuhr, Carl Schmitt, Kenneth Waltz and Martin Wightt.’ See also Nicolas Guilhot (ed.), *The Invention of International Relations* (New York: Columbia University Press 2011) and Nicolas Guilhot, *After the Enlightenment: Political Realism and International Relations in the Mid-Twentieth Century* (Cambridge: Cambridge University Press 2017).

²⁰⁹ See review in Simon Chesterman, *Just War or Just Peace?: Humanitarian Intervention and International Law* (Oxford: Oxford University Press 2002) 112-160; 164-218.

²¹⁰ Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press 1999)

²¹¹ David Armitage, *Ideological Origins of the British Empire* (Cambridge: Cambridge University Press 2010).

²¹² David Armitage, *Foundations of Modern International Thought* (Cambridge: Cambridge University Press 2013).

colonial global order; the preoccupations of this kind of intellectual history have greatly enriched our sense of even relatively recent pasts, and the role of languages of political and legal thought in making and breaking those pasts.²¹³ It has also greatly complicated some of our received understandings of the role of certain kinds of political theory and its relationship to what we might now call the international, and also with the colonial.²¹⁴

The special place of intellectual-historical approaches to studying law and legal discourses should come as no surprise. Understanding how concepts retain a stable meaning *despite* transformations in their surrounding economic, social, institutional, theological, and political contexts is as central as understanding how their meanings and applications change as a result of such transformations; stasis, and metastasis are both equally important symptoms of deeper levels of change—whether we wish to call these structural, systematic, or something else. Sometimes (legal) concepts lead and sometimes they lag, but the world does not change without them. As Koselleck remarked in his 1986 address to a convention of German legal historians,²¹⁵ we might observe a remarkable repeatability in the content of some legal concepts, allowing us to discern ‘legal sources that aim at application on the basis of their self-statement, sources whose meaning cannot be

²¹³ Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge: Cambridge University Press 2014); Andrew Fitzmaurice, *King Leopold’s Ghostwriter* (Princeton: Princeton University Press 2021); Annabel S. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton: Princeton University Press 2011); Jennifer Pitts, *Boundaries*; Duncan Bell, *Reordering the World: Essays on Liberalism and Empire* (Princeton: Princeton University Press 2016); Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton: Princeton University Press 2010); Richard Whatmore, *Against War and Empire* (New Haven: Yale University Press 2012); Benjamin Straumann, *Roman Law in the State of Nature* (Cambridge: Cambridge University Press 2015).

²¹⁴ See two recent studies of Bodin: Daniel Lee, *The Right of Sovereignty: Jean Bodin on the Sovereign State and the Law of Nations* (Oxford: Oxford University Press 2021) and Milinda Banerjee, *The Mortal God: Imagining the Sovereign in Colonial India* (Cambridge: Cambridge University Press 2018). The former revisits the theory of sovereignty in Bodin and shows the significance of the *jus natural* and *jus gentium* to be far more important than previously appreciated. The latter examines the reception of Bodin into political thought in colonial India, and its impact on 19th century anti-colonial nationalist thought.

²¹⁵ Koselleck, *Sediments of Time*, chapter 8. See also Natasha Wheatley, ‘Law and the Time of Angels: International Law’s Method Wars and the Affective Life of Disciplines’, *History and Theory* 60(2) (2021) 311-330.

reduced to the singular situation in which they emerged or to their singular history of effect ... an iterative temporal structure that differs from sources that remain imprisoned in the history of events'.²¹⁶ This, in some historical contexts, might allow us to maintain (as some legal historians do)²¹⁷ a strict demarcation of legal history which 'concentrates on texts that transport genuinely legal contents and uses neighboring disciplines only in a supplementary way'.²¹⁸ Equally necessary is 'a flexible differentiation [which] reaches out to other fields, revealing that legal history cannot in any way do without political, social, or economic history, without the history of religion, language, or literature, and so forth'.²¹⁹ Law has its inner, often much slower, dynamics of conceptual change, just as its relationship as an expression of or reaction to changing economic and social hierarchies can follow a different temporality: 'Every law can be read as a reaction to hitherto unregulated or newly emerging problems, or as a regulative instance for certain conflicts that take place outside legal boundaries. To this extent, legal history remains embedded in general history, in political and social and socioeconomic history, and, more recently, the history of technology'.²²⁰

Working along the seamline between international law's environments of determination (diplomatic relations, international organizations, networks of transnational actors such as corporations and NGOs), and its inner determinations of meaning, has perhaps become one of the most fertile places for inquiry into the historical pasts of the international and its law-related objects and subjects. In part this reflects the rise and transformation of another subfield of cloistered history since 1990, that of 'international history'. In a helpful recent retrospect on this field, Manela²²¹

²¹⁶ Koselleck, *Sediments of Time*, 132.

²¹⁷ E.g., David Ibbetson, 'What is Legal History a History Of?' in Andrew Lewis and Michael Lobban (eds.) *Law and History* (Current Legal Issues Series, Oxford: Oxford University Press 2003).

²¹⁸ Koselleck, *Sediments of Time*, 133

²¹⁹ Ibid.

²²⁰ Ibid 134.

²²¹ Erez Manela, 'International Society as a Historical Subject', *Diplomatic History*, 44(2) (2020) 184-209.

suggests that the last 30 years have seen a shift towards histories of the international as a distinct social, economic, and political space of relationships, interactions, imaginary, and network of ideas and actors. It is a mode of history that operates across different scales and also temporalities—spaces within states but densely connected across and between them; institutions that are by definition ‘international’ (such as international organizations)²²²; international project-concepts (liberal constitutionalism, global health, global development and growth, human rights, humanitarianism, sustainability, state-building, and peace-building)²²³ that circulate within explicitly international spaces but are transported into national political and economic institutions through a variety of agents, and suffer a variety of fates; as well as internationally embedded and redescribed political and social concepts (such as minority protection, self-determination, sustainable development, human rights) that are taken up, mobilized, materialized, and performed by a variety of agents. It will be evident that here, political, economic, cultural, social, and intellectual histories intersect with histories of international legal acts and international legal expertise, often in relation to

²²² Mark Mazower, *Governing the World*; Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Europe* (Oxford: Oxford University Press 2015); Glenda Sluga, *The Invention of International Order* (Princeton: Princeton University Press 2021); Patricia Clavin, *Securing the World Economy: The Reinvention of the League of Nations, 1920-1946* (Oxford: Oxford University Press 2013); Guy F. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford: Oxford University Press 2017); Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press 2009); Madeleine Herren, *Internationale Organisationen seit 1865: Eine Globalgeschichte der internationalen Ordnung* (Wissenschaftliche Buchgesellschaft: Darmstadt 2009).

²²³ See for example, the titles in the Cambridge University Press Global and International History Series: Stephen Macekura, *Of Limits and Growth* (Cambridge: Cambridge University Press 2015); Michael Goebel, *Anti-Imperial Metropolis* (Cambridge: Cambridge University Press 2015); Timothy Nunan, *Humanitarian Intervention* (Cambridge: Cambridge University Press 2016); Stefan Rinke, *Latin America and the First World War* (Cambridge: Cambridge University Press 2017); Nathan J. Citino, *Envisioning the Arab Future* (Cambridge: Cambridge University Press 2017); Christopher R. W. Dietrich, *Oil Revolution* (Cambridge: Cambridge University Press 2017); Antoine Acker, *Volkswagen in the Amazon* (Cambridge: Cambridge University Press 2017); Michele L. Louro, *Comrade Against Imperialism* (Cambridge: Cambridge University Press 2018); Amanda K. McVety, *The Rinderpest Campaigns* (Cambridge: Cambridge University Press 2018); Stephen J. Macekura and Erez Manela (eds.), *The Development Century* (Cambridge: Cambridge University Press 2018); Kirwin R. Shaffer, *Anarchists of the Caribbean* (Cambridge: Cambridge University Press 2020); Sarah C. Dunstan, *Race, Rights and Reform* (Cambridge: Cambridge University Press 2021); Agnieszka Sobocinska, *Saving the World?* (Cambridge: Cambridge University Press 2021); Florian Wagner, *Colonial Internationalism and the Governmentality of Empire, 1893-1982* (Cambridge: Cambridge University Press 2022).

paradigmatic international institutions such as the League of Nations but also in respect of examining the *in situ* workings out of international projects of politics and expertise through histories of international administration, development programming, vaccination, and hunger alleviation projects and so on. Some historical excavation in this field is also undertaken through anthropological and sociological studies of the international as concrete spaces of people and ideas, in which global legal regimes (formal and informal) are accounted for as emerging diachronically as a result of the competition and collaboration of actors wielding and pursuing certain kinds of social, economic, institutional, or symbolic power.²²⁴ Historicization is an indispensable part of such ‘reflexive sociologies’.²²⁵

At the crossroads of intellectual history and international history, a special place should be reserved for histories of human rights, a field perhaps no more than 12 years old in its current form but already arguably into a second or third generation of scholarship. Reflecting in many ways the above narrative of suspicion of, or disillusionment²²⁶ with, the new historicism of 1990s liberal international legal and political discourses, long-standing critiques of the political project of human and constitutional rights from both the left and right contributed to a historical repudiation of stale just-so stories about the rise of human rights ideas and their self-evident progress in history.

Historicism 1, reloaded, turned once more against a reinflated Historicism 2. Moyn’s prodigious and

²²⁴ E.g., Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: Chicago University Press 1994) and Yves Dezalay and Bryant G. Garth, *The Internationalisation of Palace Wars* (Chicago: Chicago University Press 2002); Grégoire Mallard, *Fallout: Nuclear Diplomacy in the Age of Global Fracture* (Chicago: Chicago University Press 2014); Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: Chicago University Press 2006).

²²⁵ Most owe their methods to Bourdieu, who emphasized historicization as the starting point for any sociological inquiry: See Pierre Bourdieu, Jean-Claude Chamboredon and Jean-Claude Passeron, *The Craft of Sociology* (1968, Berlin: de Gruyter 1991). Anthropology’s interest in historical methods and its own “archival turn” can be discerned from its engagement with Foucault, from the late 1980s: Paul Rabinow, Ann Stoler, and Sally Merry, to name a few.

²²⁶ See Jon Baskin, ‘The Disillusionment of Samuel Moyn’, blogpost, *The Chronicle of Higher Education* (2017).

original writing (3 books in 8 years)²²⁷ blazed a trail, but it was evident by the speed with which the research agenda took shape and advanced that a bone-dry tinder had been accumulating for a decade or more. The result was a torrent of work, almost all of it done by intellectual historians and international historians, which began a near-total renovation of the stories by which we understand how human rights ‘came to the world’, died, and lived again. No single narrative or reductive account can do this body of work justice, but it can be said that we have increasingly rich, contextual, historically-complex stories about: the lineages of specific rights-concepts;²²⁸ specific treaty regimes;²²⁹ rights as discourses and political vocabularies in (mostly European) intellectual history;²³⁰ anthropologically oriented work on the social and political lives of rights practices and concepts;²³¹ human rights in the global crucible of decolonization and anti-colonial wars;²³² human

²²⁷ Samuel Moyn, *The Last Utopia* (Cambridge: Harvard University Press 2010); Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press 2014); Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge: Harvard University Press 2018), plus numerous edited volumes.

²²⁸ E.g., Linde Lindqvist, *Freedom of Religion and the Universal Declaration of Human Rights* (Cambridge: Cambridge University Press 2017).

²²⁹ Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford: Oxford University Press 2017); Stephen L.B. Jensen, *The Making of International Human Rights* (Cambridge: Cambridge University Press 2016).

²³⁰ Dan Edelstein, *On the Spirit of Rights* (Chicago: Chicago University Press 2018); Nehal Bhuta, Anthony Pagden and Mira Siegelberg, *The Cambridge History of Rights* (Cambridge: Cambridge University Press 2023, forthcoming); Annabel S. Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Ideas in Context, Cambridge: Cambridge University Press 1997).

²³¹ Sally E. Merry, *Human Rights and Gender Violence* (Chicago: Chicago University Press 2006); Harri Englund, *Prisoners of Freedom: Human Rights and the African Poor* (Oakland: University of California Press 2006); Lori Allen, *The Rise and Fall of Human Rights: Cynicism and Politics in Occupied Palestine* (Stanford: Stanford University Press 2013); Miriam I. Ticktin, *Casualties of Care: Immigration and Politics of Humanitarianism in France* (Oakland: University of California Press 2011).

²³² Anthony D. Moses, Marco Duranti, Rolande Burke (eds.), *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics* (Cambridge: Cambridge University Press 2020), Fabian Klose, *Human Rights in the Shadow of Colonial Violence*.

rights advocacy movements and organizations,²³³ and human rights and neo-liberalism.²³⁴ The results were, predictably, disturbing to many claims about what the progenitors of human rights might have been, and also to deeply ingrained assumptions about the conditions under which they failed or succeeded to rise as a lingua franca of global morality. A polemical edge to these criticisms was consistently provided by Moyn, who argued—particularly from 2018—that human rights’ relationship with projects of transformative political change was largely one of containment and temporization. Human rights could, at best, be yoked to a different political project altogether, but were not a transformative project in themselves.²³⁵

F. What comes after the History of International Law?

This necessarily schematic tour of the horizon of inquiry into the many historical pasts that shape, and are shaped by, international law reveals that the renvoi to history is not one project, nor is it necessarily a self-declared critical project. Neither international lawyers nor historians have any special claim to be prophets of our time, and we ought to be skeptical of such postures. To

²³³ See Stephen Hopgood, *Keepers of the Flame: Understanding Amnesty International* (Ithaca: Cornell University Press 2006) and the growing catalogue of the Pennsylvania Studies in Human Rights: Roland Burke, *Decolonization and the Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press 2013); Jan Eckel and Samuel Moyn (eds.), *The Breakthrough: Human Rights in the 1970s* (Philadelphia: University of Pennsylvania Press 2015); Tine Destrooper and Sally E. Merry (eds.), *Human Rights Transformation in Practice* (Philadelphia: University of Pennsylvania Press 2018); Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide* (Philadelphia: University of Pennsylvania Press 2016); Jennifer Johnson, *The Battle for Algeria* (Philadelphia: University of Pennsylvania Press 2015); Paul G. Lauren, *The Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press 2011); Joe Renouard, *Human Rights in American Foreign Policy: From the 1960s to the Soviet Collapse* (Philadelphia: University of Pennsylvania Press 2015); Hans I. Roth, *P. C. Chang and the Universal Declaration of Human Rights* (Philadelphia: University of Pennsylvania Press 2018); Glenda Sulga, *Internationalism in the Age of Nationalism* (Philadelphia: University of Pennsylvania Press 2015); Fabian Close, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria* (transl. Dona Geyer, Philadelphia: University of Pennsylvania Press 2013); Daniel J. Whelan, *Indivisible Human Rights: A Story* (Philadelphia: University of Pennsylvania Press 2010).

²³⁴ Jessica Whyte, *The Morals of the Market* (London: Verso 2019). Moyn, *Not Enough*.

²³⁵ Alston perceived early on what was at stake in Moyn’s historical argument, and labelled it a struggle over the heart and soul of the human rights movement: Philip G. Alston, ‘Does the Past Matter? On the Origins of Human Rights’, *Harvard Law Review*, 126(7) (2013) 2043-2081.

paraphrase Nietzsche: Objectivity and Justice do not necessarily have anything to do with each other; but equally it seems right to say—as we have seen repeatedly in the seemingly magnetic attraction between forms of historicism and stories of international law’s development—that ‘certain historical experiences ... have all been only possible because the individual histories or the entirety of history remained saturated with interpretive frameworks of possible justice’.²³⁶ Seeking to discern conditions for possible *futures*, we seem predisposed to reach for understandings that allow us to ‘hermeneutically absorb [our experience of history] in order to live’.²³⁷ Our relationship to the possibilities of history appears to rest, if not on the perpetual recreation of grand theories of history in the mode of Historicism 1 (although it is clear that we still do that), then on some kind of ‘theory of the conditions of possible histories’. Koselleck calls this *Historik*, in contrast to the ceaseless flow of events and experience that are examined in *Historie*. *Historik* ‘asks about the theoretically discernable presuppositions that make conceivable why histories occur, how they unfold, and, likewise, how and why they must be examined. *Historik* thus aims at grasping the double-sided nature of each history, encompassing both a cluster of events and its representation’.²³⁸

As we have seen, inquiries into the historical pasts of international law can encompass a very large range of subjects and objects, as well as temporalities: short, long, structural, life-stories, and event-histories. It is also clear that one very important quality of contemporary inquiries is that they embed a range of forms of historiographical thought, with differing approaches to methods, concepts of sources, the identification of relevant phenomena and objects, and so on.

Historiographical thinking seems to me to rest on *Historik*, and as such is a form of political thought

²³⁶ Koselleck, *Sediments of Time*, 127.

²³⁷ Ibid 43.

²³⁸ Ibid.

in itself, an observation made in numerous ways by Pocock since at least 1962.²³⁹ Our sometimes querulous and ungenerous debates about what international legal history *really* is and what it *should be* in order to be critical, or something else, appear to me to boil down to debates about *what kinds of theory of history* should underlie our historiography. Desautels-Stein and Moyn, for example, argue that the US-centered project of (domestic) ‘critical legal history’ began with ‘big thinking, grand theory, and programmatic approaches to historical explanation and social transformation’, but has now been supplanted by ‘the minimalist, the pragmatic, the particularistic and the quotidian. This is the platform of problem-solving, sifting debris in the here and now’.²⁴⁰ They acknowledge that various tools of an originally critical methodology, such as genealogy and the revelation of the contingency of historical outcomes, ‘launch[ed] a thousand dissertations and illuminated substantial corners of the historical past’, but argue that the goal of critical history was to ‘forge an intellectual practice capable of emphasizing the ability and reclaiming the right for humans to make their own society so that it expresses their ... freedom as much as possible’.²⁴¹ Showing the contingency of our present-past is rightly comprehended as a limited exercise, although not a useless one, if, for example, one’s principal objective is to show the non-naturalness of certain features of the present. But the political and social consequences of any given historical claim, and the use that we can make of it in the present, rests (as the Desautels-Stein and Moyn rightly accept) on a wider set of social- and political-theoretical presuppositions that may not be derivable from the historical inquiry at hand—or any other historical *inquiry* for that matter. Rather, these presuppositions arise from a posture towards

²³⁹ John G.A. Pocock, ‘The Origins of the Study of the Past: A Comparative Approach’, *Comparative Studies in Society and History*, 4(2) (1962) 209-246; John G.A. Pocock, ‘The Politics of Historiography’, *Historical Research* 78 (2005) 1-14; John G.A. Pocock, ‘Historiography as a form of political thought’, *History of European Ideas*, 37(1) (2011) 1-6; John G.A. Pocock, ‘On the unglobality of contexts: Cambridge methods and the history of political thought’, *Global Intellectual History*, 4(1) (2019) 1-14.

²⁴⁰ Justin Desautels-Stein and Samuel Moyn, ‘1. Historiography, Ideology and Law: An Introduction’, *History and Theory*, 60(2) (2021) 292-295, at 297.

²⁴¹ Justin Desautels-Stein and Samuel Moyn, ‘2. On the Domestication of Critical Legal History’, *History and Theory*, 60(2) (2021) 296-310, at 309-310.

history and its uses; that posture can be derived from a wide range of available positions, which are themselves endowed *by* history and rendered accessible (and plausible) only through historical narrative. Each historical narrative can be contested, rendered more or less plausible by the gnawing criticism of historians but also by the wider economic, social, and political world in which it is received and debated: To say that we must learn lessons from the past in order to shape a better future—however we conceive the latter—is to have some sense of the conditions under which a historical plotline²⁴² developed and rendered plausible by the historian, answers questions posed by a transformation of experience which can no longer be answered by histories transmitted thus far.²⁴³ These conditions are, inevitably, *historical* facts (*Historie*), but the meaning we endow them as answers to new questions posed by our transformed experience, requires *Historik*. Put more poetically by Collingwood, our ‘world is infested by sphinxes, demonic beings of mixed and monstrous nature which ask [us] riddles and eat [us] if [we] cannot answer them’.²⁴⁴

For some, the pluralizing and centrifugal forces of many different methods, objects, subjects, and temporalities in the history of international law will be regarded as evidence of a desert of the real: only fragmented inquiries, disconnected narratives, deeply researched plotlines which in the end don’t seem to point the way to emancipation nor even permit the neurotic satisfaction of clearly-demarcated scholarly communities and methods (or worse: warring methodological factions which believe only *their* approach can vindicate the world-historical function of writing the history of international law). It is perhaps still too soon to say whether this fear will be realized. But equally plausible, it seems to me, is that the current state of affairs is a field of a thousand blooming flowers, in which many candidates can be found for ways of doing the history of international law. Our

²⁴² Paul Veyne, *Writing History: Essay on Epistemology* (transl. Mina Moore-Rivoluceri, Middletown: Wesleyan University Press 1984).

²⁴³ Koselleck, *Sediments of Time*, 154.

²⁴⁴ Collingwood as cited in Pocock 2005, ‘Politics of Historiography’, 7.

present condition, perhaps more than ever, entails a culture of experiencing contingency (*Kontingenzerfahrungskultur*) rather than seeking to overcome it once and for all (*Kontingenzbewältigungspraxis*).²⁴⁵ Our possible and plausible futures are shifting rapidly, and this has arguably provoked an equally constant shifting of relationships to our present-pasts. The redrawing of our path to the Now is constantly unsettled and a variety of strategies remain possible: continuities intimating the rightness of certain current pathway, *as well as* radical discontinuities begging a decisionist leap. Our present problem is not to pitch one against the other as a strategy of subversion against a dominant mode of thought, but to navigate the constant availability of these alternatives in a fragmented present in the hope of picking a winner. The result is not complacency but a constant vigilance; not a certitude of what critical method must be, but a critical and reflexive openness to what can be learned. This, it must be recognized, sits uncomfortably with many of the realities of modern academic production, but is not yet rendered completely impossible by them.

In this perspective, we might see many exciting lines of possibility in contemporary research. The frontiers of imperial and international history hold out some ways forward to overcome the Eurocentric presumptions that have long dogged the history of international law.²⁴⁶ Even as we continue to recover the many ways in which international law's 19th century Eurocentric historicism was embedded in various sites and political projects,²⁴⁷ and continued to shape plans for the remaking of states and societies well into the 20th century,²⁴⁸ it seems now more plausible to break from Eurocentric presumptions about where to locate the history of the global and its law-related

²⁴⁵ Veyne, *Writing History*, 80.

²⁴⁶ Anne-Charlotte Martineau, 'Overcoming Eurocentrism? Global History and the *Oxford Handbook of the History of International Law*', *European Journal of International Law*, 25(1) (2014) 329-336.

²⁴⁷ Samera Esmeir, *Juridical Humanity: A Colonial History* (Stanford: Stanford University Press 2012).

²⁴⁸ Umut Özsu, *Formalizing Displacement: International Law and Population Transfers* (Oxford: Oxford University Press 2013); Peter Becker and Natasha Wheatley, *Remaking Central Europe: The League of Nations and the Former Habsburg Lands* (Oxford: Oxford University Press 2020); Davide Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire, 1815-1914* (Princeton: Princeton University Press 2011).

subjects and objects. We can cast a wider net which reaches back beyond the 19th century to discern possible histories of a range of inter-polity and inter-imperial laws from antiquity to the 19th century,²⁴⁹ and the various ways in which European international law was far from being passively absorbed or imposed, but sought to be reshaped to reflect specific polities' structures of law, governance, and power—whether as regional states, notionally less-than-sovereign principalities, or empires that continued to govern large parts of the world through the end of the 19th century.²⁵⁰ China,²⁵¹ Russia,²⁵² the Ottoman Empire,²⁵³ the Princely States of India²⁵⁴ have all been the subject of recent studies, and much work remains to be done in other regions which have long histories of multi-territorial ordering, such as the African continent and South East Asia. Other work has re-examined the specific ways in which international law was used during the 19th century colonial encounter,²⁵⁵ and scoured unconventional archives to examine how seemingly discrete political-legal concepts were enacted and performed by all sorts of agents and practices 'on the ground' outside of Europe.²⁵⁶ The vista of possible histories is wide, and an area that seems especially under-researched

²⁴⁹ This approach is fundamentally aligned with what Duve calls global legal history, and it seems to me few, if any, rigid border walls need to be erected between these approaches – Duve, 'What is Global Legal History?'

²⁵⁰ Lorca, *Mestizo International Law*; Obregon, *Peripheral International Law*.

²⁵¹ Maria A. Carrai, *Sovereignty in China: A Genealogy of a Concept Since 1840* (Cambridge: Cambridge University Press 2019). Teemu Ruskola, *Legal Orientalism* (Cambridge: Harvard University Press 2013); Yasuaki Onuma, *International Law in a Transcivilizational World* (Cambridge: Cambridge University Press 2017).

²⁵² Lauri Mälksoo, *Russian Approaches to International Law* (Oxford: Oxford University Press 2015).

²⁵³ Lâle Can, Michael C. Low, Kent F. Schull and Robert Zens, *The Subjects of Ottoman International Law* (Bloomington: Indiana University Press 2020); Mostafa Minawi, 'International Law and the Precarity of Ottoman Sovereignty in Africa at the End of the Nineteenth Century', *The International History Review*, 43(5) (2020) 1098-1121; Aimee M. Genell, 'Ottoman Autonomous Provinces and the Problem of "Semi-Sovereignty" in International Law', *Journal of Balkan and Near Eastern Studies*, 18(6) (2016) 533-549; Mostafa Minawi, *The Ottoman Scramble for Africa: Empire and Diplomacy in the Sahara and the Hijaz* (Stanford: Stanford University Press 2016).

²⁵⁴ Priyasha Saksena, 'Jousting Over Jurisdiction: Sovereignty and International Law in Late Nineteenth Century South Asia', *Law and History Review*, 38(2) (2020) 409-457.

²⁵⁵ Inge Van Hulle, *Britain and International Law in West Africa: The Practice of Empire* (Oxford: Oxford University Press 2020); Mamadou Hebié, *Souveraineté territoriale par traité: une étude des accords entre puissances coloniales et entités politiques locales* (Paris: Presses Universitaires de France 2015).

²⁵⁶ Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge University Press 2014); Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford: Oxford University Press 2011).

are 20th century histories of regional international organizations, such as the Organization of American States, the Arab League, the Organization of African Unity, and the Association of South East Asian Nations. International historians, and some international lawyers,²⁵⁷ have become adept at developing rich intellectual, organizational, and cultural histories of international organizations, and their role in many kinds of legal, political, social, and economic world-making. But a great many possible and plausible histories could still emerge from reconstructing aspects of the histories of such entities and the human beings that enliven them.

Karen Knop has observed that the women have often been absent in histories of the international and global, and its laws, not the least due to their exclusion from the public spaces and roles that have been the focus of so much of this history. It remains an urgent task to recover and narrate ‘a pluralist, quotidian international’²⁵⁸ in which gendered and feminist histories can be told. Knop observes that the turn in European legal history to new histories of international private law promises the possibility of making more visible the agency and experience of women in histories of the international and the global, and its laws.²⁵⁹ A recent edited collection examining women’s international thought²⁶⁰—connected to a wider project of recovery and re-visibility of significant contributions by women left unrecognized by the canon of international relations scholarship²⁶¹—demonstrates the significant gap in historical studies that still needs to be addressed. Glenda Sluga’s

²⁵⁷ E.g., Sinclair, *To Reform the World*; Megan Donaldson, ‘The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order’, *American Journal of International Law*, 111(3) (2017) 575-627; Doreen Lustig, *Veiled Power: International Law and the Private Corporation 1886-1981* (Oxford: Oxford University Press 2020).

²⁵⁸ Karen Knop, ‘Gender and the Lost Private Side of International Law’ in Annabel S. Brett, Megan Donaldson and Martti Koskenniemi (eds.), *History, Politics, Law: Thinking Through the International* (Cambridge: Cambridge University Press 2021) 360.

²⁵⁹ Ibid.

²⁶⁰ Patricia Owens and Katharina Rietzler (eds.), *Women’s International Thought: A New History* (Cambridge: Cambridge University Press 2021).

²⁶¹ Patricia Owens and Kimberly Hutchings, ‘Women Thinkers and the Canon of International Thought: Recovery, Rejection and Reconstitution’, *American Political Science Review*, 115 (2) (2021) 347-359.

recent book on international order after Napoleon elegantly and incisively decentres a traditional ‘great (states)men’ story by demonstrating the essential role of women as political actors who helped create the political norms of post-Napoleonic Europe—only to be rendered ‘invisible in the histories that tracked the rise of modern formalized diplomacy and international politics, because historians shared the new modern premise that international politics was the terrain of properly masculine political actors, whether diplomats, foreign ministers, presidents, kings or emperors’.²⁶²

In what only 20 years ago would have been called ‘doctrinal’ or ‘internal’ legal history, much interesting research and writing is continuing, greatly enriched by currents of thinking in imperial, global, international, and cultural history.²⁶³ Recovering the lineages of doctrine²⁶⁴ remains important, not only for some specific controversies in international disputes, but also to allow us to grasp wider processes through which legal concepts emerge, change, or remain stable in time. Histories of international legal-political concepts (and concept-structures) and the contexts in which they are shaped and transformed, are amenable not only to the methods of intellectual history,²⁶⁵ but also international, diplomatic, and cultural histories.²⁶⁶ Lines between these approaches are increasingly blurry in the study of phenomena such as international organizations and their complex material and political environments, and a whole new generation of historians and international lawyers is showing a prodigious capacity to bring diverse sources and methods together to illuminate

²⁶² Glenda Sluga, *The Invention of International Order: Remaking Europe after Napoleon* (Princeton: Princeton University Press 2021) 8.

²⁶³ See the essays collected in Marcus M. Payk and Kim C. Priemel (eds.), *Crafting the International Order: Practitioners and Practice of International Law since c.1800* (Oxford: Oxford University Press 2020).

²⁶⁴ E.g., Shavana Musa, *Victim Reparation under the Jus Post Bellum: An Historical and Normative Perspective* (Studies in International and Comparative Law, Cambridge: Cambridge University Press 2019); Felix Lange, ‘Challenging the Paris Peace Treaties, State Sovereignty and Western-dominated International Law: The Multifaceted Genesis of the Jus Cogens Doctrine’, *Leiden Journal of International Law*, 31(4) (2018) 821-839.

²⁶⁵ E.g., Andrew Fitzmaurice, ‘Context in the History of International Law’, *Journal of the History of International Law*, 20 (2018) 5-30.

²⁶⁶ E.g., Megan Donaldson, ‘Survival of the Secret Treaty’.

these histories.²⁶⁷ Histories using prosopographic methods have examined how the lived-lives of international lawyers intersected with world-making projects (colonial, pacific, economic, and liberal, among others) in Europe and beyond,²⁶⁸ in which the history of international law was itself part of discursive efforts to justify or repudiate certain projects.²⁶⁹ Biographical and institutional histories are being productively brought together,²⁷⁰ often with a social-theoretical and ethnographic underlay, to explore the ‘life of international law’ within international organizations in recent decades.²⁷¹

Accounts of the emergence of professional fields of ‘international law’ within distinct national contexts, and particular styles of thought characteristic of ‘national traditions’ in international law, have been published in recent years or are being written; these continue however to suffer from severe blindspots in relation to the role of women,²⁷² and the place of non-white or other racialized

²⁶⁷ Megan Donaldson, ‘The League of Nations, Ethiopia and the Making of States’, *Humanity*, 11(1) (2020) 6-31; Wheatley, ‘Law and the Time of Angels’; Natasha Wheatley, ‘Spectral Legal Personality in Interwar International Law: On New Ways of Not Being a State’, *Law and History Review*, 35(3) (2017) 753-787; Natasha Wheatley, ‘Mandatory Interpretation: Legal Hermeneutics and the New International Order in Arab and Jewish Petitions to the League of Nations’, *Past and Present*, 227 (2015) 205-248.

²⁶⁸ See Christopher R. W. Dietrich, *Oil Revolution* and von Bernstorff and Dann, *The Battle for International Law*.

²⁶⁹ Amorosa, *Rewriting the History*. On Scott; Mark Somos and Joshua Smeltzer, ‘Vitoria, Suárez, and Grotius: James Brown Scott’s Enduring Revival’, *Grotiana*, 41(1) (2020) 137-162; Fitzmaurice, *King Leopold’s Ghostwriter*.

²⁷⁰ See Rotem Giladi, *Jews, Sovereignty and International Law: Ideology and Ambivalence in Early Israeli Legal Diplomacy* (Oxford: Oxford University Press 2021).

²⁷¹ Dimitri Van den Meerssche, *The World Bank’s Lawyers: The Life of International Law as Institutional Practice* (Oxford: Oxford University Press 2022).

²⁷² Genin, *Le laboratoire belge*; Malksoo, ‘Russian Approaches’; Ignacio de la Rasilla, *In the Shadow of Vitoria: A History of International Law in Spain (1770-1953)* (2nd edn., Leiden: Brill 2017); Ignacio de la Rasilla, ‘Camilo Barcia Trelles in and beyond Vitoria’s Shadow (1888-1977)’, *European Journal of International Law*, 31(4) (2020) 433-445; Randall Lesaffer, ‘The cradle of international law: Camilo Barcia Trelles on Francisco de Vitoria at The Hague (1927)’, *European Journal of International Law*, 31(4) (2020) 1451-1462; Juan P. Scarfi, ‘Camilo Barcia Trelles on the meaning of the Monroe Doctrine and the Legacy of Vitoria in the Americas’, *European Journal of International Law*, 31(4) (2020) 1463-1475; Jose M. Beneyto, ‘Camilo Barcia Trelles on Francisco de Vitoria: At the crossroads of Carl Schmitt’s Grossraum and James Brown Scott’s “modern international law”’, *European Journal of International Law*, 31(4) (2020) 1477-1492; Giulio Bartolini, *History of International Law in Italy* (Oxford: Oxford University Press 2020); Janne E. Nijman, ‘Marked Absences: Locating Gender and Race in International Legal History’, *European Journal of International Law*, 31(3) (2020) 1025-1050; Henri de Waele, ‘A New League of Extraordinary Gentlemen? The Professionalization of International Law Scholarship in the Netherlands, 1919–1940’, *European Journal of International Law*, 31(3) (2020) 1005-1024.

persons as agents in the formation of these professional identities could also be much more extensively examined.

Research that could be described as very much within the ‘history of (European) international political thought’ continues, and still has much to teach us about our received understandings of key political-legal thinkers within the (real or assumed) genealogies of international legal thought.²⁷³ But the lines between international and intellectual history have eroded,²⁷⁴ with historians of political thought (usually with a keen eye for the logic of political ideas) embracing archival work, cultural and popular writings, as well as sources such as textbooks, letters, and diaries, to write histories of *embodied* and *embedded* ideas.²⁷⁵ Such approaches are often particularly apt to grasp the determining influence of racial and civilizational thinking on the constitution of ideas of international legal order in the 19th and 20th centuries, or the racial and imperial order that was usually assumed to underlie the possibility of international law.²⁷⁶ Recent work has attempted to

²⁷³ Annabel S. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton: Princeton University Press 2011); Annabel S. Brett, ‘The Subject of Sovereignty: Law, Politics and Moral Reasoning in Hugo Grotius’, *Modern Intellectual History*, 17(3) (2020) 619-645; Benedict Kingsbury and Benjamin Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press 2010); Francesca Iurlaro, *The Invention of Custom: Natural Law and the Law of Nations ca. 1550-1750* (Oxford: Oxford University Press 2021); Peter Schröder (ed.), *Concepts and Contexts of Vattel’s Political and Legal Thought* (Cambridge: Cambridge University Press 2021); Lee, *The Right of Sovereignty*; Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds.), *System, Order and International Law* (Oxford: Oxford University Press 2017); Lothar Brock and Hendrik Simon (eds.), *The Justification of War and International Order* (Oxford: Oxford University Press 2020); Koskenniemi, *To the Uttermost Parts of the Earth*; Mark Somos, ‘Open and Closed Seas: The Grotius-Selden Dialogue at the Heart of Liberal Imperialism’ in Edward Cavanagh (ed.), *Empire and Legal Thought: Ideas and Institutions from Antiquity to Modernity* (Leiden: Brill 2020); Mark Somos, *American States of Nature: The Origins of Independence 1761-1775* (Oxford: Oxford University Press 2019); Straumann, *Roman Law*; Randall Lesaffer and Janne E. Nijman (eds.), *The Cambridge Companion to Grotius* (Cambridge: Cambridge University Press 2021); Brett et al, *History, Politics, Law*.

²⁷⁴ See Megan Donaldson, ‘Ventriloquism in Geneva: The League of Nations as International Organisation’ in Brett et al, *History, Politics, Law*, 253-282.

²⁷⁵ Andrew Fitzmaurice, ‘The Justification of King Leopold II’s Congo Enterprise by Sir Travers Twiss’ in Shaunagh Dorsett and Ian Hunter (eds.), *Law and Politics in British Colonial Thought* (London: Macmillan 2010) 109-126; Bell, *Reordering the World*; Getachew, *Worldmaking after Empire*; Pitt, *Boundaries*.

²⁷⁶ Duncan Bell, *Dreamworlds of Race: Empire and the Utopian Destiny of Anglo-America* (Princeton: Princeton University Press 2020); Robert Vitalis, *White World Order, Black Power* (Ithaca: Cornell University Press 2015); Getachew, *Worldmaking After Empire*.

more closely articulate the connection between sweeping global political and economic transformations such as late colonialism, late imperialism, decolonization, development, and neoliberalism, and international legal ideas and institutions—in particular international economic ordering.²⁷⁷ Other work has carefully traced legal and administrative histories of colonial expansion in relation to specific territories, and the transformation of a territory from colony to mandate to trusteeship in a century-long trajectory of domination and exploitation enabled by the international legal order.²⁷⁸ The history of the laws of war has long been a subject of historical inquiry, although generally focused on medieval or late 19th century origin-stories, with the latter especially prone to being written with an eye to vindicating, or dismissing, the project of humanizing warfare.²⁷⁹ International historians,²⁸⁰ historically-inclined international relations and political theory scholars,²⁸¹ American legal historians,²⁸² and international lawyers²⁸³ have all revisited the history over

²⁷⁷ Matthew Craven, Sundhya Pahuja and Gerry Simpson (eds.), *International Law and the Cold War* (Cambridge: Cambridge University Press 2021); Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds.), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge: Cambridge University Press 2017); Michael Fakhri, *Sugar and the Making of International Trade Law* (Cambridge: Cambridge University Press 2014); Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge: Harvard University Press 2018); Sundhya Pahuja, *Decolonizing International Law* (Cambridge: Cambridge University Press 2011); Guy F. Sinclair, 'Forging Modern States with Imperfect Tools: United Nations Technical Assistance for Public Administration in Decolonized States', *Humanity*, 11(1) (2020) 54-83; Guy F. Sinclair, 'Towards a Postcolonial Genealogy of International Organisations Law', *Leiden Journal of International Law*, 31(4) (2018) 841-869; Getachew, *Worldmaking After Empire*; Erez Manela, *The Wilsonian Moment: Self Determination and the International Origins of Anticolonial Nationalism* (Oxford: Oxford University Press 2007); Pedersen, *The Guardians*; Rose Parfitt, 'Fascism, Imperialism and International Law: An Arch Met a Motorway and the Rest is History...', *Leiden Journal of International Law*, 31(3) (2018) 509-538; von Bernstorff and Dann, *The Battle for International Law*; Lustig, *Veiled Power*.

²⁷⁸ Cait Storr, *International Status in the Shadow of Empire* (Cambridge: Cambridge University Press 2020).

²⁷⁹ See Amanda Alexander, 'A Short History of International Humanitarian Law', *European Journal of International Law*, 26(1) (2015) 109-138 and Eyal Benvenisti and Doreen Lustig, 'Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856-1874', *European Journal of International Law*, 31(3) (2020) 27-169 for overviews of these debates.

²⁸⁰ Boyd van Dijk, *Preparing for War: The Making of the Geneva Conventions* (Oxford: Oxford University Press 2022); Isabel V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (Ithaca: Cornell University Press 2014).

²⁸¹ Scheipers, Mantilla, Kinsella, Kalmanovitz.

²⁸² John F. Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press 2013).

²⁸³ Rotem Giladi, 'The Enactment of Irony: Reflections on the Origins of the Martens Clause', *European Journal of International Law*, 25(3) (2014) 847-869; Alexander, 'A Short History of International Humanitarian

the last 20 years. This surge of interest reflects, without a doubt, the fact that these last 20 years have been characterized by a series of ‘endless wars’ against and within weak states and non-state actors, in which the *jus in bello* and *jus ad bellum* have not only been stretched and reworked to accommodate an aggressive counter-terrorist military strategy and its aftermath, but in which the relentless logic of trying to achieve political order by military means²⁸⁴ has raised severe doubts about the constraining value of the such a legalizing enterprise.²⁸⁵ But the histories themselves reveal many hitherto unexamined aspects of the making of the modern laws of war. Van Dijk, to take one example, draws on newly-opened diplomatic archives concerning the drafting of the 1949 Geneva Conventions, to show that while some states, such as Gaullist France, were concerned to vindicate the sacrifices of their resistance movements through greater protections for civilians under occupation, they also joined the United Kingdom and the United States in seeking to protect prerogatives to suppress anti-colonial rebellion, to starve enemy populations through blockades, and to engage in carpet bombing and use of nuclear weapons should they have to go to war against the Soviet Union and its satellite states.²⁸⁶

G. Conclusion

This paper has taken a long retrospective on the idea of a history of international law. It has argued an account of what the history of international law *was*—an outgrowth of European legal history at the height of its historicism—and proceeded to an argument about what it can be

Law’; Amanda Alexander, ‘International Humanitarian Law, Postcolonialism and the 1977 Geneva Protocol I’, *Melbourne Journal of International Law*, 17(1) (2016) 15-50.

²⁸⁴ Emile Simpson, ‘Clausewitz’s Theory of War and Victory in Contemporary Conflict’, *Parameters* 47(4), (2017) 7-18.

²⁸⁵ David W. Kennedy, *Of Law and War* (Princeton: Princeton University Press 2006); Moyn, *Humane*.

²⁸⁶ van Dijk, *Preparing for War*. See also Van Dijk’s article on the relationship between anti-colonial movements and the ICRC: Boyd van Dijk, ‘Internationalizing Colonial War: On the Unintended Consequences of the Interventions of the International Committee of the Red Cross in South-East Asia, 1945-1949’, *Past and Present*, 250 (2021) 243-283.

understood to amount to now. Along the way, many detours have been taken, but the basic intuition of this author is that there may no longer be some discrete disciplinary activity called ‘the history of international law’ in any sense relatable to what the study of the history of international law was. Instead, we have a flourishing and proliferating mass of historical inquiries, an intersection of overlapping circles of inquiry taking place in a wide range of academic fields of history. How and whether this historical knowledge serves us in our present is something we can only resolve through an unyielding attention to, and engagement with, the relationship between our inquiries into historical pasts, and our representations of its meaning to each other and ourselves (our very own sphinxes and demonic beings). Between *Historie* and *Historik* lies our orientation to possible futures. We might successfully reimagine these as a ‘story of human sovereignty acted out in the context of a ceaseless unfolding of unitary historical time’²⁸⁷—as our most politically effective theories of history have once done²⁸⁸—or we might find that what serves us most of all is a theory of history which refuses such an operation. Only time will tell. In the meantime, I think we should follow some advice that can be simply stated, although is harder to follow: avoid wasteful and narrow sectarianisms of theory and method, and look instead for communalities of thinking about the historical inquiry at hand, which can be gleaned from history, sociology, anthropology, political theory, and law.²⁸⁹ The results could still be surprising.

²⁸⁷ Chakrabarty, *Provincializing Europe*, 15.

²⁸⁸ Donald Sassoon, *One Hundred Years of Socialism: The West European Left in the Twentieth Century* (New York: Free Press 1997) 7: To be able to define the contending parties, name them and thus establish where the barricades should go up, or where the trenches should be dug, gives one a powerful and at times decisive advantage.

²⁸⁹ For an early plea to this effect from a historian, addressed to other historians, see Greg M. Dening, ‘History as a Social System’, *Australian Historical Studies*, 15 (1973) 673-685.

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